IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1566

ARIZONA PUBLIC SERVICE COMPANY,
DEPARTMENT OF WATER AND POWER
OF THE CITY OF LOS ANGELES,
EL PASO ELECTRIC COMPANY,
NEVADA POWER COMPANY,
SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT,
SAN DIEGO GAS & ELECTRIC COMPANY,
SOUTHERN CALIFORNIA EDISON COMPANY,
TUCSON GAS AND ELECTRIC COMPANY,
UTAH POWER AND LIGHT COMPANY,
Petitioners,

v.

CHEMEHUEVI TRIBE OF INDIANS,
COCOPAH TRIBE OF INDIANS,
COMMITTEE TO SAVE BLACK MESA,
EMMA YAZZIE,
JIMMY YAZZIE,
PAUL BEGAY,
CHESTER HUGH BENALLY,
BEN BEGAY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Submitted by the Intervenors In That Court

May 6, 1974

(See list of attorneys on inside cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

NORTHCUTT ELY
FREDERICK H. RITTS
Law Offices of Northcutt Ely
Watergate 600 Building
Washington, D. C. 20037

HARRY A. POTH, JR.
PEYTON G. BOWMAN, 3rd
Reid & Priest
40 Wall Street, New York,
N.Y. 10005
and
1701 K Street, N. W.
Washington, D. C. 20006
Attorneys for all Petitioners

NICHOLAS H. POWELL
Snell & Wilmer
400 Security Building
Phoenix, Arizona 85004
Attorneys for Arizona Public Service Company

WILLIAM DUNCAN
Kemp, Smith, White, Duncan & Hammond
P. O. Box 2800
El Paso, Texas 79999
Attorneys for El Paso Electric Company

BURT S. PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power

RALPH GUY WESSON,
Assistant City Attorney
111 North Hope Street
Los Angeles, California 90051
Attorneys for Department of Water and Power, City of Los Angeles

M. GENE MATTEUCCI
P. O. Box 230
Las Vegas, Nevada 89101
Attorney for Nevada Power Company

REX LEE
2840 Iroquois Drive
Provo, Utah 84601
Jennings, Strouss & Salmon
111 W. Monroe Street
Phoenix, Arizona 85003
Attorneys for Salt River Project Agricultural Improvement and Power District

SHERMAN CHICKERING
C. HAYDEN AMES
EDWARD P. NELSEN
ALLAN J. THOMPSON
Chickering & Gregory
111 Sutter Street
San Francisco, California 94104
Attorneys for San Diego Gas & Electric Company

JOHN R. BURY
Assistant General Counsel
P. O. Box 800
Rosemead, California 91770
Attorney for Southern California Edison Company

DONALD E. DICKERMAN
Holesapple, Conner, Jones, McFall & Johnson
P. O. Box 310
Tucson, Arizona 85702
Attorneys for Tucson Gas & Electric Company

SIDNEY G. BAUCOM
ROBERT GORDON
P. O. Box 899
Salt Lake City, Utah 84110
Attorneys for Utah Power & Light Company

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Submitted by the Intervenors In That Court

The Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of

Appeals for the District of Columbia Circuit, described below.

OPINIONS BELOW

The opinion of the court below is that of the United States Court of Appeals for the District of Columbia Circuit in *Chemehuevi Tribe of Indians, et al.* v. *Federal Power Commission,* 489 F.2d 1207 (D.C. Cir. 1973), *rehearing denied* December 7, 1973, and December 19, 1973, on a petition of Chemehuevi Tribe of Indians, et al., for review of orders of the Federal Power Commission in Docket No. E-7664, dated November 4, 1971 (reported at 46 F.P.C. 1120), and December 10, 1971 (reported at 46 F.P.C. 1307).

Copies of the opinion of the Court of Appeals and of the orders of the Federal Power Commission are printed as an Appendix to this Petition, separately bound because of its length, pursuant to Rule 23(i.).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The jurisdiction of the Court of Appeals was founded on Section 313(b) of the Federal Power Act, 16 U.S.C. Sec. 825*l*(b). Its judgment was entered November 9, 1973.

The court denied a petition for rehearing of the Federal Power Commission and of the intervenors other than the Department of Water and Power of the City of Los Angeles December 7, 1973, that of the latter on December 19, 1973.

Time for filing this Petition for Certiorari was extended to April 6, 1974, by order of Mr. Justice Douglas February 27, 1974, and to May 6, 1974, by order of the Chief Justice April 3, 1974.

Jurisdiction of the Supreme Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW:

Context

For over a half century the Federal Power Commission has consistently determined that under the Federal Water Power Act (now Part I of the Federal Power Act) it has licensing jurisdiction over hydroelectric plants only, *i.e.*, plants generating electricity by water power. Accordingly, in this case, it dismissed, sua sponte, a complaint which urged it to assert licensing jurisdiction, for the first time, over steam-electric generating plants. The Court of Appeals, while agreeing with the Commission that the explicit language of this Court in *FPC* v. *Union Electric Co.*, 381 U.S. 90, as well as the legislative history and consistent administrative interpretation of the Federal Power Act, required it to reject the argument that Section 4(e) of the Act extends the Commission's licensing jurisdiction to steam plants as "project works" in consequence of their use of waters of a navigable stream in their boilers and cooling operations, nevertheless held that Section 4(e) does confer licensing jurisdiction on the Commission with respect to utilization by steam plants of "surplus water" from any government dam for such purposes. It remanded the case to the Commission to determine whether the water used in the six steam plants involved here is "surplus water," and whether any jurisdiction that the Commission might have is affected in any way by the jurisdiction of any other federal agency. It did not define the term "surplus water."

These six thermal plants, situated in Arizona, Nevada, Utah and New Mexico consume waters of the Colorado River System for boiler and cooling purposes in conformity with the apportionments of consumptive use made in the Colorado River Compact, the Upper Colorado River Basin Compact, the decree of this Court in *Arizona* v. *California, et al.*, 376 U.S. 340 (1964), and applicable regulations of the Secretary of the Interior.

The complainants are the Chemehuevi and Cocopah Tribes of Indians (users of Colorado River water), and others who do not allege ownership of water rights.

Issues

The questions presented for review are:

1. (a) Whether Section 4(e) of the Federal Power Act (16 U.S.C. Sec. 797(e)), which authorizes the Federal Power Commission to issue a license "for the purpose [*inter alia*] of utilizing the surplus water or water power from any Government dam," requires that a license be obtained for the use of water by thermal electric generating plants solely for boiler and cooling purposes, as contrasted with the use of water or water power for hydroelectric power generation, and, in particular,

(b) Whether a Federal Power Commission license is required for the use of water supplied to a thermal electric generating plant, solely for boiler and cooling purposes, by a federal agency other than the Federal Power Commission pursuant to acts of Congress which specify that consumptive use of water stored by a particular government dam shall be made only under a contract executed by that agency.

2. Whether a justiciable case or controversy is presented by the contentions of the complainants, and, in particular,

(a) Whether consumptive uses of water which are incontestably within the quantities apportioned by the Colorado River Compact to the basin in which such uses are made, and are within the quantities apportioned to the state of use by the decree of this Court in *Arizona* v. *California, et al.*, 376 U.S. 340 (1964), or by the Upper Colorado River Basin Compact, are subject to challenge by users of water in any other basin or state; and

(b) Whether the water rights of the Chemehuevi and Cocopah Indian Tribes, being "present perfected rights," are so completely protected by the decree of this Court in *Arizona* v. *California, et al.*, and by the Colorado River Compact, against shortages occasioned by any other users of water as to render non-justiciable any claim on their behalf for further protection of their water rights by the Federal Power Commission; and

(c) Whether a complainant having no interest itself in the water which is used by another has standing to complain of that use.

STATUTORY PROVISIONS

Relevant extracts from the statutes involved are printed as Attachment A, following the signature page.

They are:

Sections 4(e) and 23 of the Federal Power Act, 16 U.S.C. §§ 797(e), 817.

Section 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d.

Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c).

Sections 4 and 14 of the Colorado River Storage Project Act, 43 U.S.C. §§ 620c, 620m.

Sections 11(a), (b), 13(a), (b), 14 of the Navajo-San Juan Chama Project Act, 43 U.S.C. §§ 615ss(a), (b), 615uu(a),(b), 615vv.

Act of March 22, 1968, P.L. 90-272; 82 Stat. 52; U.S. Code Cong. & Admin. News at 63 (1968).

Sections 301(b), (c), and 303(a), (b), (c), (d) of the Colorado River Basin Project Act, 43 U.S.C. §§ 1521(b), (c), 1523(a),(b),(c),(d).

Articles III(a), (c), and VIII of the Colorado River Compact, H. Doc. 717, 80th Cong., pp. A19, A21.

Article III(a) of the Upper Colorado River Basin Compact, H. Doc. 717, 80th Cong., p. A169.

STATEMENT OF THE CASE

Proceedings in the Federal Power Commission

On September 10, 1971, the Chemehuevi Tribe of Indians, et al.[1] (Complainants), filed with the Federal Power Commission a Complaint, Petition for Order to Show Cause and Request for Expedited Procedure, against Arizona Public Service Company, et al.,[2] ask-

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[1] The Cocopah Tribe of Indians, the Sierra Club, Committee to Save Black Mesa, Emma Yazzie, Jimmie Yazzie, Paul Begay, Chester Hugh Benally, and Ben Begay.

[2] Nine "complainees" were named: Arizona Public Service Company, Southern California Edison Company, Salt River Project Agricultural Improvement and Power District, Tucson Gas & Electric Company, El Paso Electric Company, Nevada Power Company, Utah Power & Light Company, Department of Water and Power of the City of Los Angeles, San Diego Gas & Electric Company.

ing the Commission to assert licensing jurisdiction under Part I of the Federal Power Act [3] over six planned or existing steam electric generating plants [4] which use waters of the Colorado River System in their boilers and for cooling purposes.

The sole issue presented in the complaint was:

> "[D]oes the Federal Power Commission have licensing jurisdiction over steam plants generating and transmitting energy in interstate commerce, which withdraw large quantities of water from navigable streams for cooling and other plant purposes?" [5]

The Commission, sua sponte, entered an order November 7, 1971 (App. 78a), dismissing the Complaint for lack of jurisdiction, citing *FPC* v. *Union Electric Co.*, 381 U.S. 90, 110 (1965). It denied a petition for rehearing December 10, 1971 (App. 81a).

The complainants petitioned the Court of Appeals for the District of Columbia to review the Commission's orders, under Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).

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[3] 16 U.S.C. §§ 792-823. Part I, captioned "Regulation of the Development of Water Power and Resources," enacted in 1920 as the Federal Water Power Act, superseded the General Dam Act of 1906, 34 Stat. 386, and statutes applicable to individual dams.

[4] See Attachment B for a tabulation of ownership in each plant, and Attachment C, a location map. The Appendix, printed separately, contains a description of each plant with citations of federal water contracts and legislation authorizing such contracts. (App. 83a)

[5] As quoted in the court's opinion at 1211.

The Opinion of the Court of Appeals

On November 9, 1973, the court handed down its opinion (App. 1a). The court identified two issues (p. 1214):

> "Petitioners contend that FPC jurisdiction is properly invoked under § 4(e) of the Federal Power Act for two reasons: either because the six plants identified in the complaint are 'project works' necessary for the development of power along navigable waters or because the plants will utilize 'surplus water' from Government dams."

As to the first ground, the court, citing primarily *FPC* v. *Union Electric Company*, 381 U.S. 90 (1965), held that the six plants are not "project works" necessary for the development of power along navigable waters, and accordingly that the "navigable waters" clause of Section 4(e) did not confer licensing authority on the Commission. The court said, *inter alia* (pp. 1222-23):

> "The history of the Act shows beyond any doubt that the only segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydroelectric power."

It referred to the Federal Power Commission's 52 years' consistent interpretation of the act to the same effect (now 54 years), commencing with its first annual report in 1920, and said (p. 1224):

> "Because the 'unadorned language' of the Act, moreover, does not compel the interpretation for which petitioners contend, consistent administrative construction to the contrary commands our respect; indeed, it is entitled to 'great weight'. (Citing cases.)

* * * * *

> "It is not without significance, moreover, that this administrative interpretation was transmitted directly to Congress the year after passage of the Act, and that the only two significant amendments to the Act over the following fourteen years, including a reenactment of the Act in 1935, gave no hint of congressional desire to override the Commission's construction of the scope of its jurisdiction." (p. 1225)

Moreover (p. 1225):

> "Consistent judicial interpretation also requires us to reject petitioners' argument that the Act extends the Commission's licensing jurisdiction to steam plants."

It might be thought that these conclusions disposed of the entire case.

Not so. Turning to the "surplus water" language of Section 4(e), the court said (p. 1235):

> "Petitioners contend that two of the Four Corners plants—Navajo and Kaiparowitz [*sic*]—will draw water directly from impoundments created by a Government dam, and that the other four plants[6] are downstream from Government dams and will have water available on a dependable basis only because of the 'stream regimen imposed by upsteam government dams'. [Footnote omitted] According to petitioners, these are usages of 'surplus water' that invoke Commission jurisdiction under § 4(e) and require the Commission to regulate the operations of the Four Corners plants.[7]

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[6] (Our footnote.) This assertion about the other four plants is an afterthought, not appearing in the Complaint or Petition for Rehearing submitted to the Federal Power Commission. See the restrictions on contentions to be considered on appeal, in Sec. 313(b) of the Federal Power Act.

[7] (Our footnote.) The court several times refers to all six power plants as the "Four Corners plants." Mohave is 375 miles from Four Corners, Navajo 137 miles, Kaiparowits 170 miles, Huntington 250 miles, San Juan 9 miles. See map, Attachment C.

> We agree that § 4(e) empowers the FPC to license the use of surplus water by steam plants, and accordingly we remand to the Commission for consideration of petitioners' 'surplus water' claim."

After citing pre-Federal Water Power Act cases involving hydroelectric projects using water diverted from reservoirs created by government dams, the court said (p. 1242):

> "Accordingly, we hold that the Commission erred in dismissing petitioners' complaint, and we remand to the Commission to consider the surplus water claim. We do not decide whether the FPC does have jurisdiction over the four plants alleged to be the beneficiaries of Government surplus water by virtue of their being downstream from Government dams because we have no record on which to base such a determination. We hold only that *the Commission does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants,* and we leave to the Commission to determine in the first instance whether the plants involved in this appeal fall within the category asserted by petitioners. In determining this question, the Commission should also consider whether any jurisdiction it might have under the Federal Power Act is affected in any way by the jurisdiction of any other federal agency." (Emphasis added; footnote omitted.)

The Power Plants Involved

The six steam electric generating plants involved are the Mohave Plant in Nevada, the Navajo Plant in Arizona, the proposed Kaiparowits Plant and the Huntington Plant in Utah, and the San Juan and Four Corners Plants in New Mexico. Their locations are shown on the map, Attachment C, and their ownerships are tabulated in Attachment B. All use waters

of the Colorado River System. Descriptions of the plants, their water supply, and the contractual and statutory basis thereof appear in the separately printed Appendix. (App. 83a)

The "Law of the River"

The uses of water by these plants are "consumptive uses," that is, the quantity returned to the stream is less than the quantity diverted.[8] The consumptive use of water is to be distinguished from non-consumptive use of water and water power, *e.g.*, in the generation of hydroelectric power.

The consumptive use of all waters of the Colorado River System is controlled by one or more of the elements of the "Law of the River," [9] *i.e.*, the opinion and decree of this Court in *Arizona* v. *California, et al.*, the Colorado River Compact, the Mexican Water Treaty, the body of statutes known as the Reclamation Law, the Boulder Canyon Project Act,[10] the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act, the Colorado River Basin Project Act, the Navajo-San Juan Chama Act, and regulations of the Secretary of the Interior. (Citations, *supra*, at 5-6.)

The conflict of the decision below with the consumptive-use statutes is summarized in Parts II and III of the Argument.

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[8] Arizona v. California, 373 U.S. 546, 557, n. 23 (1963). The quantity thus "permanently withdrawn" is quoted by the Court of Appeals (p. 1214) from our adversaries' brief as aggregating 250,000 acre-feet annually.

[9] See the requirement stated in Sec. 601(c) of the Colorado River Basin Project Act, 43 U.S.C. § 1551(c). The relevant elements of the "Law of the River" are cited in the Argument.

[10] See particularly Sec. 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d.

The Complainants

The Chemehuevi Tribe of Indians owns a reservation in California adjacent to the Colorado River. The Tribe was decreed "present perfected rights" to waters of the main stream by Article II(D)(1) of the decree in *Arizona* v. *California, et al.*, 376 U.S. 340, 344 (1964).

The Cocopah Tribe of Indians owns a reservation in Arizona adjacent to the Colorado River. It was decreed "present perfected rights" to waters of the main stream by Article II(D)(2) of the same decree, 376 U.S. 340, 344.

Both tribes, being owners of present perfected rights, are further protected against shortage by Article II(B)(3) of that decree, 376 U.S. 340, 343, and the statute implementing that provision of the decree, 43 U.S.C. §1521(b).

The Committee to Save Black Mesa is a group interested in effects of some, but not all, of the plants on air quality. It does not allege that it owns any water rights.

The remaining complainants are the Sierra Club and five individuals, residents of the Navajo Reservation. None claims to own a water right which would be affected by use of water by any of the plants.

The Effect of the Decision

We thus have a case in which the court below issued a novel decision of nationwide effect, *i.e.*, "that the Commission does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants," although (1) the legislative history and judi-

cial interpretation of Part I of the Federal Power Act (originally enacted as the Federal Water Power Act) demonstrate that Congress' sole concern was with regulation of hydro power generation, not steam power generation, and "surplus water" was no exception; (2) every one of the six plants would be exempt, on the court's own criteria, even if the court's construction of the Act were correct; and (3) in the Colorado River Basin the "Law of the River" would preclude the statement of a justiciable cause of action by any of the complainants in any court.

It is no answer to say that, if this is so, the Federal Power Commission will find, on remand, that the jurisdiction thus conferred upon it is "affected . . . by the jurisdiction of any other federal agency." Even if all consumptive uses in the Colorado River Basin were determined by the Federal Power Commission to be excluded from its jurisdiction by reason of the "Law of the River" (hence making this case moot, after an unnecessary trial), the mischief would have been done: the lower court's novel and erroneous construction of the Federal Power Act, enlarging the licensing jurisdiction of the Federal Power Commission to encompass all thermal plants using "surplus water" from a government dam (including in that term flowing water *below* as well as stored water *at* such a dam), would be the law controlling the Commission in this key Circuit. Most of these petitioners own or plan steam power plants outside the Colorado River Basin, and so are affected by the new interpretation of Section 4(e) irrespective of the effect given the "Law of the River" by the Commission on remand.

The national economic impact is discussed in Part I.

REASONS FOR GRANTING THE WRIT

The court below decided important questions of federal law (the applicability of Part I of the Federal Power Act, particularly Section 4(e) (16 U.S.C. § 797(e)), to steam electric generating plants) which have not been, but should be, settled by the Supreme Court. The holding conflicts with applicable decisions of this Court, notably *Federal Power Commission* v. *Union Electric Company*, 381 U.S. 90 (1965), and *Arizona* v. *California, et al.*, 373 U.S. 546 (1963), decree 376 U.S. 340 (1964).

I. THE NOVEL DECISION BELOW, EXPANDING THE JURISDICTION OF THE FEDERAL POWER COMMISSION TO ENCOMPASS THE LICENSING OF THE USE OF WATER BY STEAM ELECTRIC GENERATING PLANTS, CONFLICTS WITH ADMINISTRATIVE AND JUDICIAL INTERPRETATION OF THE FEDERAL POWER ACT, AND IS AN INVASION OF THE LEGISLATIVE FUNCTION IN AN AREA OF GRAVE CURRENT NATIONAL IMPORTANCE

1. The decision's novelty is self-evident, as is its conflict with the legislative history and administrative construction of the Federal Power Act.

For the first time in 54 years, a court has held that the licensing provisions of the Federal Power Act apply to the use of water in the boilers and condensing apparatus [11] of a steam electric generating plant.

As the court noted (pp. 1223-26), the Federal Power Commission has consistently interpreted the Act as restricting its jurisdiction to "the consideration of projects designed to produce water power," com-

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[11] See the court's opinion at 1213 and at 1232, n. 128, for descriptions of the cooling process.

mencing with its first annual report, which was submitted to Congress in 1921, [12] and continuing right down to the present decision of the Commission. This administrative construction has excluded all steam plants, without the "surplus water" distinction now created by the court below.

Paradoxically, however, the court decided that use of surplus water by steam generating plants falls within the scope of the Act, even though the legislative history of the surplus water clause in Section 4(e) of the Act shows that Congress' sole concern was the use of such water for the development of water power. *See, e.g.*, H.Rep. No. 592, 63rd Cong., 2d Sess. (1914); 51 Cong. Rec. 11068-70, 11403, 13256 (1914). Dams, water conduits, and reservoirs, used for water power generation, constituted Congress' sole concern in its consideration of the bills which resulted in the Federal Water Power Act, now Part I of the Federal Power Act. If, in 1920, as the court properly held, Congress did not

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[12] As the Court of Appeals said (p. 1225): ". . . the only two significant amendments to the Act over the following fourteen years, including a reenactment of the Act in 1935, gave no hint of congressional desire to override the Commission's construction of the scope of its jurisdiction."

As this Court said in Udall v. Tallman, 380 U.S. 1, 16 (1965):

"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." And in Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, et al., 367 U.S. 396, 408 (1961): "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'."

choose to require licenses for steam plants, even those using water from navigable streams, it certainly did not choose, by silence, to require licensing the use of "surplus water" by steam plants. The greater decision included the lesser.

The use of water in steam electric plants is largely a consumptive use,[13] as distinguished from the non-consumptive use of the energy in falling water in hydroelectric plants. Until now, the Commission has had no jurisdiction to license consumptive uses from a government dam, but only non-consumptive uses of the energy of falling water in hydroelectric power generation. Where Congress has intended a federal agency to have authority with respect to consumptive uses, it has invariably specified an agency other than the Federal Power Commission. (See Part II of this Argument.)

2. The decision below cannot be reconciled with that of this Court in *FPC* v. *Union Electric Company*, 381 U.S. 90 (1965).

In that case the Court, construing Section 23(b) of the Federal Power Act as encompassing a pumped-storage project on a non-navigable tributary, producing power transmitted in interstate commerce (whether or not it affected navigable waters downstream), rejected the argument that, if this were so, then the Act must be construed to require licenses of steam plants in the same circumstances. It said (p. 110) that:

> ". . . Part I, the original Federal Water Power Act, is concerned with the utilization of water re-

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[13] Diversions less returns to the river. Arizona v. California, 373 U.S. 546, 557, n. 23 (1963).

> sources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission." (Footnote omitted.)

The decision below would erase that distinction, and substitute a new and curious one: that while steam plants using water from navigable streams do not require licenses, steam plants using surplus water from any government dams, even on non-navigable streams, do require a license.

The decision below thus squarely conflicts with *Union Electric* for the reason identified by the Court of Appeals itself (p. 1232):

> "If the 'power potential in water' is not involved when water is heated to drive a turbine, there would appear to be less warrant to conclude that it is involved when water is used in the post-generation, cooling process. And there would be no warrant to conclude that the mere extraction of water, with a consequent decrease in the amount of water available to downstream users for power generation, utilizes the 'power potential in water' in a manner impinging on the FPC's licensing jurisdiction."

3. The decision's change in the law is of nationwide importance, and amounts to judicial legislation in a field now under active consideration by Congress.

The court below concedes (p. 1231):

> ". . . Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness."

The opinion below cites facts enough to demonstrate its national impact. Thus, at pp. 1212-13:

> "Although estimates of the precise rate of growth vary, it is undisputed that the demand for electric power—as well, of course, as that for other kinds of energy—is increasing at a staggering rate. According to one source, consumption of electric power is growing by 9% per year, and demand for it is expected to double during each of the next two or three decades. The expected 250% increase in the demand for electric energy between 1970 and 1990 will require at least 255 new thermal-electric plants of 500,000 kilowatts to 2,000 megawatts capacity. Ninety-one of these plants will be fossil-fueled; 164 will be nuclear-fired.
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> The tremendous projected growth in the production of thermal-electric power is expected to increase cooling requirements from 120 billion gallons a day in 1971, about 10% of the average daily runoff in the continental United States, to 200 billion gallons a day by 1980 and to 600 billion gallons a day by 2000, an amount equivalent to 50% of the average daily runoff in the United States." (Footnotes omitted.)

The court's statistics, impressive as they are, tell only part of the story. The Federal Power Commission's projection [14] is that by the year 1990 there will be

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[14] FPC, 1970 National Power Survey, Tables 18.5 and 18.6 at I-18-6 (1971). Other sources of information include: FPC, News Release No. 19620, Tables 4, 5 (Sept. 12, 1973); Electrical World at 45-54 (Sept. 15, 1973); Edison Electric Institute, Fifty-fourth Semi-annual Electric Power Survey 17 (Oct. 1, 1973); National Petroleum Council, U.S. Energy Outlook 21 (Dec. 1972); National Petroleum Council, U.S. Energy Outlook: Fuels for Electricity 7 (1973). See also, Southern Interstate Nuclear Board, Power Plant Siting in the United States 1972—a State Summary 77-79 (Feb.

in service 1,520 fossil-fueled plants [15] with an aggregate capacity of 558,000,000 kw, and 408 nuclear plants with an installed capacity of 500,000,000 kw.[16] The total installed capacity of the Nation's thermal plants can be expected to treble by the year 1990.

This expansion is and will be nationwide.

As the court noted, all thermal plants use water for boiler and cooling purposes.

Congress now has under active consideration the question of whether a federal agency shall control the siting and licensing of steam electric plants, [17] and, if so, what agency. No one, until now, has suggested that Congress resolved this question 54 years ago. An issue so profoundly affecting the national economy is one for decision by Congress, and should not be left to the Court of Apeals for final resolution by a novel construction of an inapplicable statute. Congress, in making its determination, will hear interests and points of view not represented in this litigation.

15, 1973); National Water Commission, Water Policies for the Future, ch. 6 (June 1973).

[15] National Power Survey, Table 18.5 at I-18-6.

[16] National Power Survey, Table 18.6 at I-18-6.

[17] The Administration's proposed Electric Facilities Siting Act of 1973, S. 935; H.R. 4874, 93d Cong., 1st Sess. (1973); H.R. 180, H.R. 2373, H.R. 3591, and H.R. 5278, 93d Cong., 1st Sess. (1973). See also, Power Plant Siting and Environmental Protection Hearings before the Subcomm. on Communications and Power of the Comm. on Interstate and Foreign Commerce, House of Representatives (Serial No. 93-32); Hearings before the Subcomm. on Communications and Power, Committee on Interstate and Foreign Commerce, House of Representatives on H.R. 5277 (revised) at 26-27, 92d Cong., 1st Sess. (1971). 4 BNA Environment Rep. Monograph No. 15 (June 22, 1973).

The court itself, after referring to pending proposals for legislation, quite properly said (pp. 1234-35):

> "We are restricted to the statute as written by the Congress, illuminated by legislative history, and construed by the Supreme Court. It is not our function either 'to rewrite a statute so that it will authorize what [we think] should be authorized' or to 'write into an act of Congress a provision which Congress affirmatively omitted.' These canons would be violated if we were to order the FPC to assert jurisdiction over fossil-fueled steam plants. The arguments made by petitioners would be better addressed to the Congress, which has not yet decided to provide explicitly for federal regulation of power plant siting." (Footnotes omitted.)

Those observations (directed to the "project works" clause of Section 4(e)) apply with equal force to the "surplus water" clause in the same sentence of the same section, as to which the court inexplicably reached the opposite result.

II. THE DECISION BELOW, IF ALLOWED TO STAND, WOULD CAUSE CHAOS NOT ONLY IN THE ADMINISTRATION OF THE FEDERAL POWER ACT, BUT ALSO IN THE ADMINISTRATION OF WATER RESOURCE PROJECTS WHICH CONGRESS HAS ENTRUSTED TO AGENCIES OTHER THAN THE FEDERAL POWER COMMISSION

The decision fails to define "surplus water from a Government dam," the pivot of its decision, or to give the Commission any criteria for making such a determination on remand, or to tell the Commission what kind of a government contract has the effect of excluding waters delivered thereunder from the status of "surplus," subjected to the Commission's jurisdiction. The resulting field of uncertainty is immense. Over

2,100 government dams are now in existence,[18] plus a large number of authorizations not yet implemented by appropriations.

The decision accepts the respondents' (complainants') contention that licenses are required retroactively here because (p. 1235):

> "... Petitioners contend that two of the Four Corners plants—[19] Navajo and Kaiparowitz [*sic*] will withdraw water directly from impoundments created by a Government dam, and the other four plants are downstream from Government dams and will have water available on a dependable basis only because of the 'stream regimen imposed by upstream government dams.'" (Footnote omitted.)

This poses two quite different jurisdictional assumptions: (1) that the use is of water stored behind a

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[18] The Dam Inspection Program Act of 1972, 33 U.S.C.A. § 467, directed the Corps of Engineers to compile a list of dams greater than 25 feet in height, or having reservoir capacity greater than 50 acre-feet. Preliminary figures are available from the Corps, and will be published in 1975. These show a total of 2,111 structures, the components being:

Bureau of Reclamation	488
Corps of Engineers	450
Tennessee Valley Authority	45
International Boundary and Water Commission	7
Forest Service	251
Bureau of Sport Fisheries and Wildlife	243
Geological Survey	7
Bureau of Land Management	569
Bureau of Indian Affairs	51

The data now being compiled by the Corps pursuant to this congressional directive is, of course, available to the Supreme Court. See the response of the Commissoner of Reclamation to the inquiry of Mr. Justice Douglas in United States v. Gerlach Live Stock Co., 339 U.S. 725, 759-60 (1950).

[19] (Our footnote.) See n. 7, *supra*.

government dam, or (2) that the use is made downstream from a government dam at a point where the stream regimen is affected by that dam (a use which does not necessarily involve a contract with the federal administrator of the dam).

1. As to the first hypothesis (re stored water used at a government dam, or released therefrom for downstream use pursuant to contract with the administrator of the dam), subsequent legislation has superseded the surplus water provisions of Section 4(e) with respect to dams administered by the Secretary of the Army, the Secretary of the Interior and some other agencies. [20]

Some 450 dams have been constructed by the Secretary of the Army (through the Corps of Engineers) under the authority of successive Flood Control Acts, or Rivers and Harbors Acts. [21] Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s, directs the Secretary of the Army to turn over to the Secretary of the Interior power and energy surplus to the needs of the project, for disposition by the Secretary of the Interior. Section 6 of that Act, 33 U.S.C. Section 708, authorizes the Secretary of the Army to make contracts "for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Secretary of the Army." These two sections eliminate the applicability of the "surplus

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[20] In Udall v. FPC, 387 U.S. 428, 438 (1967), the Court, speaking of the effect of subsequent fishery enhancement legislation on the 1920 Federal Water Power Act, said: "We need not speculate as to what the 1920 purpose may have been. For the 1965 Anadromous Fish Act [citation omitted] is on this aspect of the present case in pari materia with the 1920 Act."

[21] These figures have been compiled from the 1970 and 1972 Annual Reports of the Chief of Engineers, Department of the Army. They exclude a large number of statutory authorizations not yet implemented by appropriations for construction.

water" clause of Section 4(e) of the Federal Power Act to use of water from flood control and navigation dams pursuant to contract. But the opinion would seem to make Section 4(e) applicable to use by downstream steam plants of the water released to make room for floods, and water passing through turbines at the dam.

Some 488 dams have been constructed, or authorized by Congress for construction, by the Secretary of the Interior, under the authority of the body of statutes known as the Reclamation Law.[22] Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), requires contracts with the Secretary for use of either water or power therefrom. There would appear to be no place for the operation of Section 4(e) here. But is Section 4(e) now to be made applicable to use by downstream steam plants of waters released through the turbines at the Reclamation dam, or flood waters discharged over its spillway, as contrasted with waters released for irrigation? The opinion seems to say so. (p. 1235)

With respect to dams constructed or authorized for construction by specialized agencies, contracts with the administrative agency are generally required for the use of water or power therefrom. The "integrated control system" of the Tennessee Valley Authority includes 45 dams, of which the United States, through TVA, owns 37 and "controls" eight.[23] The International Boundary and Water Commission, United States and Mexico, has constructed seven. Are licenses now to be required for the first time for downstream use of water released from such dams in the exercise of statutory or treaty functions?

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[22] United States Department of the Interior, Bureau of Reclamation, Water and Land Resource Accomplishments (1972).

[23] T.V.A. Handbook 53 (1972).

With respect to the 251 dams administered by the Forest Service, the 243 administered by the Bureau of Sports Fisheries and Wildlife, the 569 administered by the Bureau of Land Management, and the 51 administered by the Bureau of Indian Affairs, the lower court's decision may require a licensing proceeding for any steam plant downstream from such a dam.

The Colorado River Basin, we think, is a particularly clear example of the congressional decision to delegate to the Secretary of the Interior, to the exclusion of the Federal Power Commission, the authority to dispose of all power and all water made available by government dams for consumptive use. But this is the very basin in which the new jurisdiction of the Federal Power Commission is made to germinate by this opinion.

The consumptive use of water of the Colorado River Basin (*e.g.*, by steam electric plants) is controlled by the "Law of the River," *i.e.*, interstate compacts, acts of Congress, decrees of this and other courts, the Mexican Water Treaty, and, with respect to use of water from government dams, by acts of Congress which delegate federal authority exclusively to the Secretary of the Interior.

Thus, the Boulder Canyon Project Act, which controls use of water from the main stream in the Lower Basin (*e.g.*, by the Mohave Plant), specifies in Section 5 (43 U.S.C. § 617d) that:

> "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

See *Arizona* v. *California*, 373 U.S. 546, 580 (1963). The Mohave Plant uses water pursuant to such a contract. In an earlier Colorado River case, *Arizona* v.

California, 298 U.S. 558, 570 (1936), the Court said (referring to the Boulder Canyon Project Act):

> "... the United States, by congressional legislation and by acts of its officers which that legislation authorizes, has undertaken, in the asserted exercise of its authority to control navigation, to impound, and control the disposition of, the surplus water in the river not already appropriated."

In the Upper Basin of the Colorado River, where the Navajo, Kaiparowits, Huntington, San Juan, and Four Corners Plants are located, Congress has been equally at pains to assure that no one can acquire the right to use waters stored by the United States except by contract with the Secretary. See Sections 4 and 14 of the Colorado River Storage Project Act, 43 U.S.C. §§ 620c, 620m, and Sections 11(a), (b), 13(a), (b), 14 of the San Juan-Chama Act, 43 U.S.C. §§ 615ss(a), (b), 615uu(a), (b), 615vv.[24] A statute (43 U.S.C. § 1523) authorized federal financial participation in the Navajo Plant, using water from Glen Canyon Dam, and specified that such use shall be debited to Arizona's apportionment under the Upper Colorado River Basin Compact. A special statute ratified the Secretary's contract to supply water to the San Juan Plant. Act of March 22, 1968, P.L. 90-272, U.S. Code Cong. & Admin. News, at 63 (1968).

Manifestly, Section 4(e) of the Federal Power Act, whatever assumption is made about its intended scope in 1920, has been rendered wholly inoperative in the

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[24] Coordinated operation of the reservoirs impounded by Hoover Dam (Lake Mead) and Glen Canyon Dam (Lake Powell) is required by Section 602 of the Colorado River Basin Project Act, 43 U.S.C. § 1552, and is implemented by the Secretary's regulations. 35 Fed. Reg. 8951 (1970).

Colorado River Basin by subsequent legislation. The opinion below, in this Colorado River case, is thus a declaratory judgment as to the Colorado River, but a drastically operative judgment (and a mistaken one) as to all the other river basins of the country.

2. As to the court's second hypothesis, *i.e.*, that FPC jurisdiction attaches to use by steam plants of water flowing below a government dam (at least absent a contract with the dam's administrator) wherever the regimen of the stream is affected by that dam: The decision is momentous in two respects: (1) because it construes "surplus water" for the first time to encompass all flowing waters in a reach (navigable or not) affected by an upstream government dam, and this includes nearly every river and stream in the country, and (2) because it would require a license for use of those free-flowing waters by a steam plant.

In only one case in 54 years has the Commission undertaken to invoke the surplus water clause of Section 4(e) with respect to such downstream water, even for licensing of a hydroelectric project, and in that case this same Court of Appeals set the Commission's order aside.

In *California Oregon Power Co.*, 13 F.P.C. 1, 4 (1954), 15 F.P.C. 14 (1956), the Commission asserted licensing jurisdiction over certain hydroelectric plants (two of which were 57 and 59 miles downstream from a government dam). In our case the court quotes with apparent approval from the 1954 FPC decision in that case (p. 1235):

> "Where there is available stored water not to be used in irrigation, which represents storage over and above that needed for irrigation, and which would otherwise flow unused down the main channel of the stream, that water is 'surplus water,'

> and, if used for power development, would require a license from this Commission."

But this same court, in *California Oregon Power Co.* v. *FPC*, 239 F. 2d 426 (D.C. Cir. 1956), dismissed a petition for review of that FPC decision because of lack of a justiciable controversy (these being navigable waters, thus affording "admitted jurisdiction"). In doing so, it expressed its skepticism about the Commission's definition of "surplus waters," quoted above, which the same court now embraces:

> ". . . even counsel for the Commission is uncertain that this definition is correct.
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> "The record is, in fact, in such a state that we could hardly hold (if we reached the question) that Copco has been shown to be a user of surplus water, on any theory." *Id.* at 432.

Nevertheless, the court in the present case appears to have adopted, with respect to *steam* plants, the jurisdictional basis that it had declined to adopt in the earlier case, with reference to *hydroelectric* plants, *i.e.*, use of water flowing in a stream *below* a government dam.

The decision below thus apparently requires that in every case the Federal Power Commission must determine whether or not some government dam upstream from a thermal power plant has "imposed a regimen" on the stream at the point at which water is taken, or is proposed to be taken, for boiler or cooling purposes. If so, then a license is required. If not, then no license is required. How far downstream does the aura of federal jurisdiction extend, absent a contract requiring the release of such waters? If a flood control dam shaves an inch off the crest of a flood 50 miles downstream, does a steam plant located

there require a license? Does it matter whether the stream at that point is navigable or not? The opinion gives no criteria.

The geographical scope of the decision is as disturbing as its legislative character. The 2,100 existing government dams are located in every river basin of consequence in the United States. It is safe to say that substantially every steam electric generating station, existing or planned, is thus downstream from some government dam.

The decision thus not only thrusts the Federal Power Act into potential collision with the great water conservation statutes enacted in the ensuing half century, in which Congress elected to designate agencies other than the Federal Power Commission as administrators of the water and power resources created by government dams, *supra,* and as enforcement agencies with respect to stream pollution,[25] but also leaves the Commission with a hopelessly obscure new mandate controlling its own administration of the Federal Power Act.

III. THE DECISION BELOW ERRONEOUSLY PRESUPPOSES THE RIGHT OF A WATER USER IN ONE STATE OR BASIN OF THE COLORADO RIVER TO COMPLAIN OF USES OF WATER IN ANOTHER STATE OR BASIN. THESE COMPLAINANTS LACK STANDING

The "Law of the River" precludes the recognition of the complaint in this case as presenting a justiciable case or controversy with relation to the consumptive

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[25] *See, e.g.,* the Federal Water Pollution Control Act, 33 U.S.C. § 1227; the National Environmental Policy Act, 42 U.S.C. § 4321.

use of water of the Colorado River system by any of the six power plants.

All of these plants are using water in conformity with the inter-basin apportionments made by the Colorado River Compact (H. Doc. 717, 80th Cong., Appendix 203, p. A17), and the intra-basin apportionments which were made, with respect to uses in the Upper Basin, by the Upper Colorado River Basin Compact (H. Doc. 717, 80th Cong., Appendix 231, p. A167), and, with respect to uses in the Lower Basin, by the decree in *Arizona* v. *California, et al.*, 376 U.S. 340 (1964).

These elements of the Law of the River preclude objections by a water user in one basin against uses of water in the other basin which are consistent with the Colorado River Compact, *Arizona* v. *California,* 350 U.S. 114 (1956), and preclude objections by a water user against uses by others in the same basin which are consistent with the intra-basin apportionments referred to.

Moreover, the Chemehuevi Tribe and Cocopah Tribe own present perfected rights to the use of water in quantities and with priorities which are protected from impairment by any water user by the decree in *Arizona* v. *California, et al.*, 376 U.S. 340 (1964), Article II (D)(1), (2), and II(B)(3), supplemented by the shortage provisions of the Colorado River Basin Project Act of 1968, 43 U.S.C. Section 1521(b)(c), and by Articles VII, VIII of the Colorado River Compact.

The individual complainants, and the Committee to Save Black Mesa, are apparently residents of New Mexico, but none alleges ownership of any water right. The only Indian tribe having interests in the San Juan River, the Navajo Tribe, has granted all necessary

authorizations for use of coal and water by these plants.[28] As to the Sierra Club, the court below properly held that it lacked standing to seek judicial review of the FPC order (p. 1212, n. 12), citing *Sierra Club* v. *Morton*, 405 U.S. 727 (1972).

Thus, none of the complainants could present a justiciable case or controversy in any judicial proceeding founded (as this complaint was) on the "complainees'" consumptive use of water of the Colorado River System, because each complainant is precluded by the Law of the River from objecting to the use of water by any of the six plants. All of the complainants accordingly lack standing to complain of such use. *Arizona* v. *California*, 298 U.S. 558, 566, 567 (1936); *Arizona* v. *California*, 283 U.S. 423, 463-64 (1931); *New York* v. *Illinois*, 274 U.S. 488, 489 (1927); *New Jersey* v. *Sargent*, 269 U.S. 328, 338 (1926).

To hold otherwise would require radical interpretations of the controlling interstate compacts, and of the decree of this Court in *Arizona* v. *California, et al.*, 376 U.S. 340 (1964), which could not be adjudicated in the absence of the parties to those compacts and that decree.

Congress, of course, did not authorize the Federal Power Commission to resolve objections to use of water which would not be justiciable in judicial proceedings, and could not constitutionally do so.

CONCLUSION

The issues in this case are novel, and of such grave national importance as to justify resolution of them by the Supreme Court. They should not be left in the

[28] App. 88a.

state of uncertainty created by the lower court's remand to the Federal Power Commission, nor, with all respect, should they be left for resolution by the Court of Appeals.

If the decision below is not reversed or vacated, the result will be that drastically new law affecting the construction and operation of thermal electric plants throughout the United States (except in the Colorado River Basin) will have been made by a decision with respect to Colorado River plants which are exempt from FPC licensing by the terms of the court's own criteria.

This decision is thus, in effect, a declaratory judgment which has no meaningful application to the case before it, because our case is within the exceptions that it prescribes, but which, if allowed to stand, would change the law on a nationwide basis, except in the very river basin which is involved in the decision. Most of these petitioners also have power plants outside the Colorado River Basin, and so would be affected by this dichotomy.

The Commission would be required to invent all the terms of a steam plant license, without guidance from a statute which is understandably silent on a subject that it was never intended to encompass.

Such a change in the law, if it is to be made, should be made by Congress, not the courts. Congress now has under active consideration this very question, of what authority it shall newly delegate, and to what agencies, with respect to the siting and licensing of thermal power plants. Congress will hear many

vitally affected people and points of view not represented in this case.

Respectfully submitted,

NORTHCUTT ELY
FREDERICK H. RITTS
Law Offices of Northcutt Ely
Watergate 600 Building
Washington, D. C. 20037

HARRY A. POTH, JR.
PEYTON G. BOWMAN, 3rd
Reid & Priest
40 Wall Street, New York,
N.Y. 10005
and
1701 K Street, N. W.
Washington, D. C. 20006
Attorneys for all Petitioners

NICHOLAS H. POWELL
Snell & Wilmer
400 Security Building
Phoenix, Arizona 85004
Attorneys for Arizona Public Service Company

WILLIAM DUNCAN
Kemp, Smith, White, Duncan & Hammond
P. O. Box 2800
El Paso, Texas 79999
Attorneys for El Paso Electric Company

BURT S. PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power

RALPH GUY WESSON,
Assistant City Attorney
111 North Hope Street
Los Angeles, California 90051
Attorneys for Department of Water and Power, City of Los Angeles

M. GENE MATTEUCCI
P. O. Box 230
Las Vegas, Nevada 89101
Attorney for Nevada Power Company

REX LEE
2840 Iroquois Drive
Provo, Utah 84601
Jennings, Strouss & Salmon
111 W. Monroe Street
Phoenix, Arizona 85003
Attorneys for Salt River Project Agricultural Improvement and Power District

SHERMAN CHICKERING
C. HAYDEN AMES
EDWARD P. NELSEN
ALLAN J. THOMPSON
Chickering & Gregory
111 Sutter Street
San Francisco, California 94104
Attorneys for San Diego Gas & Electric Company

JOHN R. BURY
Assistant General Counsel
P. O. Box 800
Rosemead, California 91770
Attorney for Southern California Edison Company

DONALD E. DICKERMAN
Holesapple, Conner, Jones, McFall & Johnson
P. O. Box 310
Tucson, Arizona 85702
Attorneys for Tucson Gas & Electric Company

SIDNEY G. BAUCOM
ROBERT GORDON
P. O. Box 899
Salt Lake City, Utah 84110
Attorneys for Utah Power & Light Company

ATTACHMENT A

STATUTORY PROVISIONS

Federal Power Act

Section 4(e) of the Federal Power Act, 16 U.S.C. Section 797(e) provides:

"[Sec. 797] The Commission is authorized and empowered—

* * * * *

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated im-

provement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided further,* That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection."

Section 23(b) of the Federal Power Act, 16 U.S.C. Section 817, provides:

"It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Com-

mission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws. June 10, 1920, c. 285, § 23, 41 Stat. 1075; Aug. 26, 1935, c. 687, Title II, § 210, 49 Stat. 846."

Boulder Canyon Project Act

Section 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d, provides in part:

"Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

Reclamation Project Act of 1939

Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), provides:

"(c) The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: *Provided further*, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such

project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes."

Colorado River Storage Project Act

Sections 4 and 14 of the Colorado River Storage Project Act, 43 U.S.C. §§ 620c, 620m, provide:

"Sec. 4. Except as otherwise provided in this Act, in constructing, operating, and maintaining the units of the Colorado River storage project and the participating projects listed in section 1 of this Act, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto): *Provided,* That (a) irrigation repayment contracts shall be entered into which, except as otherwise provided for the Paonia and Eden projects, provide for repayment of the obligation assumed thereunder with respect to any project contract unit over a period of not more than fifty years exclusive of any development period authorized by law; (b) prior to construction of irrigation distribution facilities, repayment contracts shall be made with an 'organization' as defined in paragraph 2(g) of the Reclamation Project Act of 1939 (53 Stat. 1187) which has the capacity to levy assessments upon all taxable real property located within its boundaries to assist in making repayments, except where a substantial proportion of the lands to be served are owned by the United States; (c) contracts relating to municipal water supply may be made without regard to the limitations of the last sentence of section 9(c) of the Reclamation Project Act of 1939; and (d), as to Indian lands within, under or served by any participating project, payment of construction costs within the capability of the land to

repay shall be subject to the Act of July 1, 1932 (47 Stat. 564): *Provided further*, That for a period of ten years from the date of enactment of this Act, no water from any participating project authorized by this Act shall be delivered to any water user for the production on newly irrigated lands of any basic agricultural commodity, as defined in the Agricultural Act of 1949, or any amendment thereof, if the total supply of such commodity for the marketing year in which the bulk of the crop would normally be marketed is in excess of the normal supply as defined in section 301(b) (10) of the Agricultural Adjustment Act of 1938, as amended, unless the Secretary of Agriculture calls for an increase in production of such commodity in the interest of national security. All units and participating projects shall be subject to the apportionments of the use of water between the Upper and Lower Basins of the Colorado River and among the States of the Upper Basin fixed in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, and to the terms of the treaty with the United Mexican States (Treaty Series 994).

* * * * *

"Sec. 14. In the operation and maintenance of all facilities, authorized by Federal law and under the jurisdiction and supervision of the Secretary of the Interior, in the basin of the Colorado River, the Secretary of the Interior is directed to comply with the applicable provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, and the Treaty with the United Mexican States, in the storage and release of water from reservoirs in the Colorado River Basin. In the event of the failure of the Secretary of the Interior to so comply, any State of the Colorado River Basin may maintain an action in the Supreme Court of the United States to enforce the provisions of this section, and consent is given to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise."

Navajo-San Juan Chama Project Act

Sections 11(a), (b), 13(a), (b), 14 of the Navajo-San Juan Chama Project Act, 43 U.S.C. §§ 615ss(a), (b), 615uu(a), (b), 615vv provide:

Sec. 615ss(a), (b):

"(a) No person shall have or be entitled to have the use for any purpose, including uses under the Navajo Indian irrigation project and the San Juan-Chama project authorized by sections 615jj and 615pp of this title, of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries originating above Navajo Reservoir to the use of which the United States is entitled under these projects execept under contract satisfactory to the Secretary and conforming to the provisions of sections 615ii-615yy of this title. Such contracts, which, in the case of water for Indian uses, shall be executed with the Navajo Tribe, shall make provision, in any year in which the Secretary anticipates a shortage, taking into account both prospective runoff originating above Navajo Reservoir and the available water in storage in Navajo Reservoir, for a sharing of the available water in the following manner: The prospective runoff shall be apportioned between the contractors diverting above and those diverting at or below Navajo Reservoir in the proportion that the total normal diversion requirement of each group bears to the total of all normal diversion requirements. In the case of contractors diverting above Navajo Reservoir, each such contract shall provide for a sharing of the runoff aportioned to said group in the same proportion as the normal diversion requirement under said contract bears to the total normal diversion requirements of all such contracts that have been made hereunder: *Provided*, That for any year in which the foregoing sharing procedure either would apportion to any contractor diverting above Navajo Reservoir an amount in excess of the runoff anticipated to be physically available at the point of his diversion, or would result in no water being available to one or more such contractors, the runoff apportioned to said group shall

be reapportioned, as near as may be, among the contractors diverting above Navajo Reservoir in the proportion that the normal diversion requirements of each bears to the total normal diversion requirements of the group. In the case of contractors diverting from or below Navajo Reservoir, each such contract shall provide for a sharing of the remaining runoff together with the available storage in the same proportion as then normal diversion requirement under said contract bears to the total normal diversion requirements under all such contracts that have been made hereunder.

"The Secretary shall not enter into contracts for a total amount of water beyond that which, in his judgment, in the event of shortage, will result in a reasonable amount being available for the diversion requirements for the Navajo Indian irrigation project and the initial stage of the San Juan-Chama project as specified in sections 615jj and 615pp of this title.

"No long-term contract, except contracts for the benefit of the lands and for the purposes specified in sections 615jj and 615pp of this title, shall be entered into for the delivery of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries, as aforesaid, until the Secretary has determined by hydrologic investigations that sufficient water to fulfill said contract is reasonably likely to be available for use in the State of New Mexico during the term thereof under the allocations made in articles III and XIV of the Upper Colorado River Basin compact, and has submitted such determination to the Congress of the United States and the Congress has approved such contracts: *Provided*, That nothing contained in the foregoing shall be construed to forbid the Secretary from entering into temporary water supply contracts in the San Juan River Basin for any year in which he determines that water legally available for use in the upper basin of the Colorado River system would otherwise not be used there and is not needed to fulfill the obligations of the upper division States with respect to delivery of water at Lee Ferry.

"(b) If contracts are entered into for delivery from storage in Navajo Reservoir of water not covered by subsection (a) of this section, such contracts shall be subject to the same provision for sharing of available water supply in the event of shortage as in the case of contracts required to be made pursuant to subsection (a) of this section.

Sec. 615uu(a), (b):

"(a) The use of water, including that diverted from the Colorado River system to the Rio Grande Basin, through works constructed under authority of sections 615ii-615yy of this title, shall be subject to and controlled by the Colorado River compact, the Upper Colorado River Basin compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act, and the Mexican Water Treaty (Treaty Series 994), and shall be included within and shall in no way increase the total quantity of water to the use of which the State of New Mexico is entitled and limited under said compacts, statutes, and treaty, and every contract entered into under sections 615ii-615yy of this title for the storage, use, and delivery of such water shall so recite.

"(b) All works constructed under authority of sections 615ii-615yy of this title, and all officers, employees, permittees, licensees, and contractees of the United States and of the State of New Mexico acting pursuant thereto and all users and appropriators of water of the Colorado River system diverted or delivered through the works constructed under authority of sections 615ii-615yy of this title and any enlargements or additions thereto shall observe and be subject to said compacts, statutes, and treaty, as hereinbefore provided, in the diversion, delivery, and use of water of the Colorado River system, and such condition and covenant shall attach as a matter of law whether or not set out or referred to in the instrument evidencing such permit, license, or contract and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming and the users of water therein or

thereunder by way of suit, defense or otherwise in any litigation respecting the waters of the Colorado River system.

Sec. 615vv:

"In the operation and maintenance of all facilities under the jurisdiction and supervision of the Secretary of the Interior authorized by sections 615ii-615yy of this title, the Secretary is directed to comply with the applicable provisions of the Colorado River compact, the Upper Colorado River Basin compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act and the treaty with the United Mexican States in the storage and release of water from reservoirs in the Colorado River Basin. In the event of the failure of the Secretary of the Interior to so comply, any State of the Colorado River Basin may maintain an action in the Supreme Court of the United States to enforce the provisions of this section, and consent is given to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise. Pub.L. 87-483, § 14, June 13, 1962, 76 Stat. 101."

Act of March 22, 1968, P.L. 90-272

Act of March 22, 1968, P.L. 90-272; 82 Stat. 52; U.S. Code Cong. & Admin. News at 63 (1968):

"NAVAJO RESERVOIR, NEW MEXICO—WATER DELIVERY CONTRACTS

"PUBLIC LAW 90-272; 82 STAT. 52

[S. J. Res. 123]

"Joint Resolution to approve long-term contracts for delivery of water from Navajo Reservoir in the State of New Mexico, and for other purposes.

"WHEREAS section 11(a) of the Act of June 13, 1962 (76 Stat. 96; Public Law 87-483), provides that: 'No long-term contract, except contracts for the benefit of the lands and for the purposes specified in sections 2 (Navajo Indian irrigation project) and 8 (San Juan-Chama project) of this Act, shall be entered into for

the delivery of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries, as aforesaid, until the Secretary has determined by hydrologic investigation that sufficient water to fulfill said contract is reasonably likely to be available for use in the State of New Mexico during the term thereof under the allocations made in articles III and XIV of the Upper Colorado River Basin Compact, and has submitted such determination to the Congress of the United States and the Congress has approved such contracts'; and

"WHEREAS the Secretary has made such determination in connection with the following contracts transmitted to Congress by letter dated November 21, 1967:

	Water diversion (acre-feet)	Estimated water depletion (acre-feet)	Proposed uses
"Public Service Company of New Mexico	20,200	16,200	Thermal-electric generation.
"Southern Union Gas Company	50	50	Pump cooling
Utah Construction and Mining Company	44,000	35,300	Thermal-electric generation.
	64,250	51,550	

"Now, therefore, be it

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

"Such contracts are hereby approved by the Congress. The Secretary may enter into amendments thereto which would in his judgment be in the interest of water conservation, but the total water depletion shall not exceed the estimates set forth in this joint resolution.

"Approved March 22, 1968."

Colorado River Basin Project Act

Sections 301(b), (c), and 303(a),(b),(c),(d) of the Colorado River Basin Project Act, 43 U.S.C. §§ 1521(b), (c), 1523(a),(b),(c),(d):

Sec. 1521(b), (c):

"(b) Article II(B) (3) of the decree of the Supreme Court of the United States in Arizona against California (376 U.S. 340) shall be so administered that in any year in which, as determined by the Secretary, there is insufficient main stream Colorado River water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada, diversions from the main stream for the Central Arizona Project shall be so limited as to assure the availability of water in quantities sufficient to provide for the aggregate annual consumptive use by holders of present perfected rights, by other users in the State of California served under existing contracts with the United States by diversion works heretofore constructed, and by other existing Federal reservations in that State, of four million four hundred thousand acre-feet of mainstream water, and by users of the same character in Arizona and Nevada. Water users in the State of Nevada shall not be required to bear shortages in any proportion greater than would have been imposed in the absence of this subsection. This subsection shall not affect the relative priorities, among themselves, of water users in Arizona, Nevada, and California which are senior to diversions for the Central Arizona Project, or amend any provisions of said decree.

"(c) The limitation stated in subsection (b) of this section shall not apply so long as the Secretary shall determine and proclaim that means are available and in operation which augment the water supply of the Colorado River system in such quantity as to make sufficient mainstream water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada.

* * * * *

Sec. 1523(a), (b), (c), (d):

"(a) The Secretary is authorized and directed to continue to a conclusion appropriate engineering and economic studies and to recommend the most feasible plan for the construction and operation of hydroelectric generating and transmission facilities, the purchase of electrical energy, the purchase of entitlement to electrical plant capacity, or any combination thereof, including participation, operation, or construction by non-Federal entities, for the purpose of supplying the power requirements of the Central Arizona Project and augmenting the Lower Colorado River Basin Development Fund: *Provided*, That nothing in this section or in this Act contained shall be construed to authorize the study or construction of any dams on the main stream of the Colorado River between Hoover Dam and Glen Canyon Dam.

"(b) If included as a part of the recommended plan, the Secretary may enter into agreements with non-Federal interests proposing to construct thermal generating powerplants whereby the United States shall acquire the right to such portions of their capacity, including delivery of power and energy over appurtenant transmission facilities to mutually agreed upon delivery points, as he determines is required in connection with the operation of the Central Arizona Project. When not required for the Central Arizona Project, the power and energy acquired by such agreements may be disposed of intermittently by the Secretary for other purposes at such prices as he may determine, including its marketing in conjunction with the sale of power and energy from Federal powerplants in the Colorado River system so as to produce the greatest practicable amount of power and energy that can be sold at firm power and energy rates. The agreements shall provide, among other things, that—

"(1) the United States shall pay not more than that portion of the total construction cost, exclusive of interest during construction, of the powerplants, and of any switchyards and transmission facilities serving the United States, as is represented by the ratios of

the respective capacities to be provided for the United States therein to the total capacities of such facilities. The Secretary shall make the Federal portion of such costs available to the non-Federal interests during the construction period, including the period of preparation of designs and specifications, in such installments as will facilitate a timely construction schedule, but no funds other than for preconstruction activities shall be made available by the Secretary until he determines that adequate contractual arrangements have been entered into between all the affected parties covering land, water, fuel supplies, power (its availability and use), rights-of-way, transmission facilities and all other necessary matters for the thermal generating powerplants;

"(2) annual operation and maintenance costs shall be apportioned between the United States and the non-Federal interests on an equitable basis taking into account the ratios determined in accordance with the foregoing clause (1): *Provided, however,* That the United States shall share on the foregoing basis in the depreciation component of such costs only to the extent of provision for depreciation on replacements financed by the non-Federal interests;

"(3) the United States shall be given appropriate credit for any interests in Federal lands administered by the Department of the Interior that are made available for the powerplants and appurtenances;

"(4) costs to be borne by the United States under clauses (1) and (2) shall not include (a) interest and interest during construction, (b) financing charges, (c) franchise fees, and (d) such other costs as shall be specified in the agreement.

"(c) No later than one year from September 30, 1968, the Secretary shall submit his recommended plan to the Congress. Except as authorized by subsection (b) of this section, such plan shall not become effective until approved by the Congress.

"(d) If any thermal generating plant referred to in subsection (b) of this section is located in Arizona,

and if it is served by water diverted from the drainage area of the Colorado River system above Lee Ferry, other provisions of existing law to the contrary notwithstanding, such consumptive use of water shall be a part of the fifty thousand acre-feet per annum apportioned to the State of Arizona by article III (a) of the Upper Colorado River Basin Compact (63 Stat. 31)."

Colorado River Compact

(H. Doc. 717, 80th Cong., pp. A19, A21)

"ARTICLE III

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

* * * * *

"ARTICLE VII

"Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

"ARTICLE VIII

"Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

"All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate."

Upper Colorado River Basin Compact

(H. Doc. 717, 80th Cong., p. A169)

"ARTICLE III

"(a) Subject to the provisions and limitations contained in the Colorado River Compact and in this Compact, there is hereby apportioned from the Upper Colorado River System in perpetuity to the States of Arizona, Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use of water as follows:

"(1) To the State of Arizona the consumptive use of 50,000 acre-feet of water per annum.

"(2) To the States of Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use per annum of the quantities resulting from the application of the following percentages to the total quantity of consumptive use per annum apportioned in perpetuity to and available for use each year by Upper Basin [*sic*] under the Colorado River Compact and remaining after the deduction of the use, not to exceed 50,000 acre-feet per annum, made in the State of Arizona.

State of Colorado ..... 51.75 percent,

State of New Mexico .... 11.25 percent,

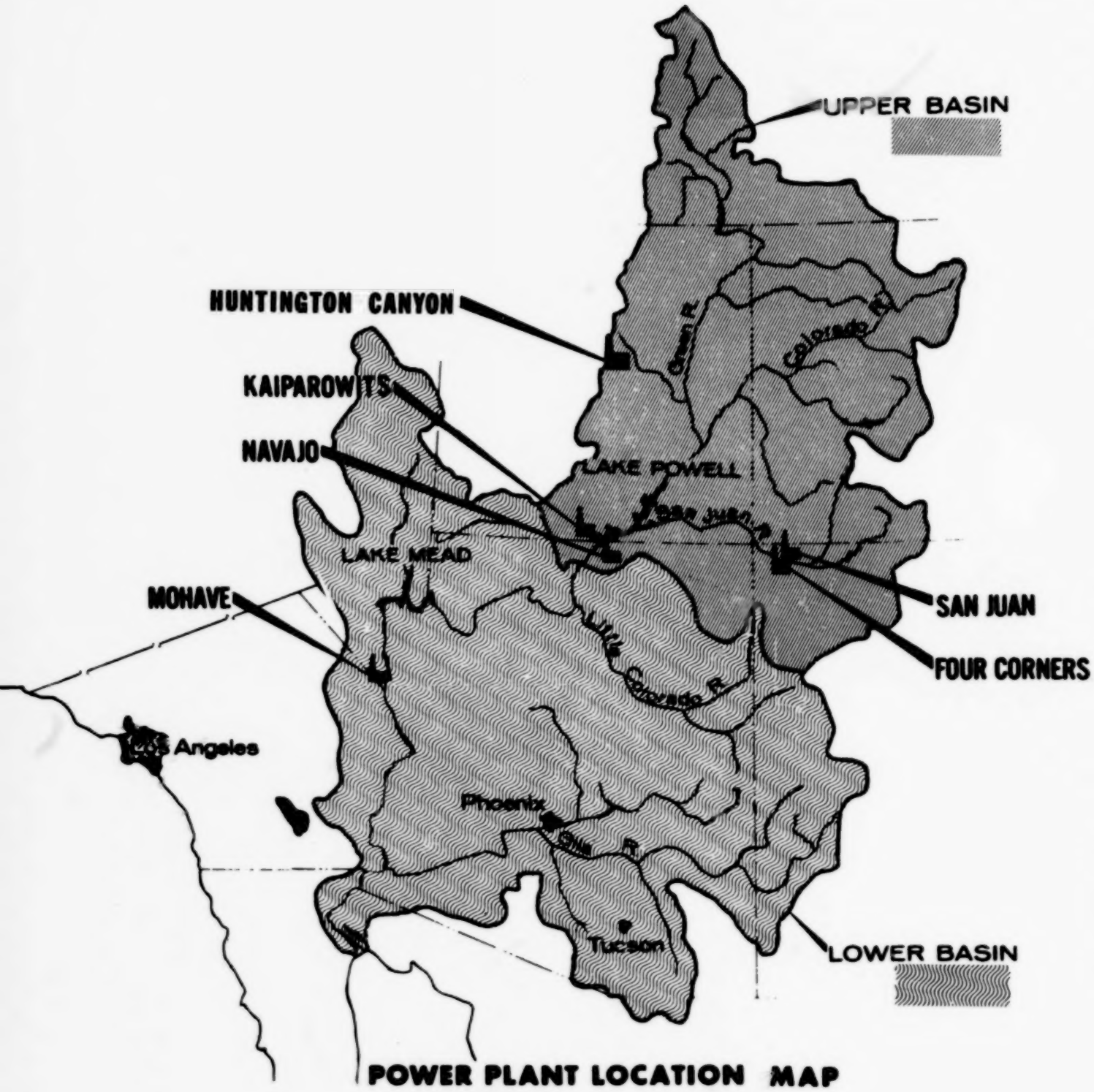
State of Utah ..... 23.00 percent,

State of Wyoming ..... 14.00 percent."

ATTACHMENT B

Ownership of Power Plants

Plant	*Owner*	*Percentage*
Mohave	Southern California Edison Company	56
	Nevada Power Company	14
	Department of Water & Power, City of Los Angeles	20
	Salt River Project Agricultural Improvement & Power District	10
Navajo	United States of America	24.3
	Salt River Project Agricultural Improvement & Power District	21.7
	Arizona Public Service Company	14
	Tucson Gas & Electric Company	7.5
	Nevada Power Company	11.3
	Department of Water & Power, City of Los Angeles	21.2
Kaiparowits	Arizona Public Service Company	18
	Southern California Edison Company	40
	San Diego Gas & Electric Company	23.4
	Salt River Project Agricultural Improvement & Power District	10
	Unassigned	8.6
Huntington	Utah Power & Light Company	100
San Juan	Tucson Gas & Electric Company	50
	Public Service Company of New Mexico	50
Four Corners	Arizona Public Service Company	100
First 3 units	Arizona Public Service Company	15
Units 4 & 5	El Paso Electric Company	7
	Public Service Company of New Mexico	13
	Salt River Project Agricultural Improvement & Power District	10
	Southern California Edison Company	48
	Tucson Gas & Electric Company	7



POWER PLANT LOCATION MAP

COLORADO RIVER BASIN

ATTACHMENT C

Supreme Court, U. S.
FILED
MAY 6 1974

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1666

ARIZONA PUBLIC SERVICE COMPANY,
DEPARTMENT OF WATER AND POWER
OF THE CITY OF LOS ANGELES,
EL PASO ELECTRIC COMPANY,
NEVADA POWER COMPANY,
SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT,
SAN DIEGO GAS & ELECTRIC COMPANY,
SOUTHERN CALIFORNIA EDISON COMPANY,
TUCSON GAS AND ELECTRIC COMPANY,
UTAH POWER AND LIGHT COMPANY,
Petitioners (Intervenors Below),

~~FEDERAL POWER COMMISSION, *Petitioner,*~~

v.

CHEMEHUEVI TRIBE OF INDIANS,
COCOPAH TRIBE OF INDIANS,
COMMITTEE TO SAVE BLACK MESA,
EMMA YAZZIE,
JIMMY YAZZIE,
PAUL BEGAY,
CHESTER HUGH BENALLY,
BEN BEGAY,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Submitted by the Intervenors In That Court

(See list of attorneys on inside cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

NORTHCUTT ELY
FREDERICK H. RITTS
Law Offices of Northcutt Ely
Watergate 600 Building
Washington, D. C. 20037

HARRY A. POTH, JR.
PEYTON G. BOWMAN, 3rd
Reid & Priest
40 Wall Street, New York,
N.Y. 10005
and
1701 K Street, N. W.
Washington, D. C. 20006
Attorneys for all Petitioners

NICHOLAS H. POWELL
Snell & Wilmer
400 Security Building
Phoenix, Arizona 85004
Attorneys for Arizona Public Service Company

WILLIAM DUNCAN
Kemp, Smith, White, Duncan & Hammond
P. O. Box 2800
El Paso, Texas 79999
Attorneys for El Paso Electric Company

BURT S. PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power

RALPH GUY WESSON,
Assistant City Attorney
111 North Hope Street
Los Angeles, California 90051
Attorneys for Department of Water and Power, City of Los Angeles

M. GENE MATTEUCCI
P. O. Box 230
Las Vegas, Nevada 89101
Attorney for Nevada Power Company

REX LEE
2840 Iroquois Drive
Provo, Utah 84601
Jennings, Strouss & Salmon
111 W. Monroe Street
Phoenix, Arizona 85003
Attorneys for Salt River Project Agricultural Improvement and Power District

SHERMAN CHICKERING
C. HAYDEN AMES
EDWARD P. NELSEN
ALLAN J. THOMPSON
Chickering & Gregory
111 Sutter Street
San Francisco, California 94104
Attorneys for San Diego Gas & Electric Company

JOHN R. BURY
Assistant General Counsel
P. O. Box 800
Rosemead, California 91770
Attorney for Southern California Edison Company

DONALD E. DICKERMAN
Holesapple, Conner, Jones, McFall & Johnson
P. O. Box 310
Tucson, Arizona 85702
Attorneys for Tucson Gas & Electric Company

SIDNEY G. BAUCOM
ROBERT GORDON
P. O. Box 899
Salt Lake City, Utah 84110
Attorneys for Utah Power & Light Company

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[489 F.2d 1207 (1973)]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-2012

THE CHEMEHUEVI TRIBE OF INDIANS *et al.*, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

ARIZONA PUBLIC SERVICE COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, UTAH POWER & LIGHT COMPANY, DEPARTMENT OF WATER & POWER OF THE CITY OF LOS ANGELES, EL PASO ELECTRIC COMPANY, NEVADA POWER COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY, INTERVENORS

Petition for Review of Orders of the Federal Power Commission

---

[1208] Decided November 9, 1973

Joseph J. Brecher, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, for petitioners, *Reid Chambers* and *Edward Berlin* also entered appearances for petitioners.

Daniel Goldstein, Assistant General Counsel, Federal Power Commission, with whom *Gordon Gooch*, General

Counsel, *Leo E. Forquer*, Solicitor, and *George W. McHenry, Jr.*, First Assistant Solicitor, Federal Power Commission, were on the brief, for respondent. *J. Richard Tano*, Deputy Solicitor, Federal Power Commission, at the time the record was filed, also entered an appearance for respondent.

Harry A. Poth, Jr., with whom *Richard M. Merriman, Peyton G. Bowman, III*, and *Robert T. Hall, III* were on the brief, for intervenor Arizona Public Service Company and certain other intervenors.

Edward P. Nelsen and *Robert W. Tollen* were on the brief for intervenor San Diego Gas & Electric Company.

Sidney G. Baucom and *Robert Gordon* entered appearances for intervenor Utah Power & Light Company.

Edward C. Farrell entered an appearance for intervenor Department of Water & Power of the City of Los Angeles.

William Duncan entered an appearance for intervenor El Paso Electric Company.

Samuel P. Cowley entered an appearance for intervenor Nevada Power Company.

Leroy Michael entered an appearance for intervenor Salt River Project Agricultural Improvement & Power District.

John R. Bury entered an appearance for intervenor Southern California Edison Company.

Before WRIGHT, TAMM and MCCREE,* *Circuit Judges.*

---

* Of the Sixth Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a) (1970).

Opinion for the court filed by *Circuit Judge* McCree.

McCree, *Circuit Judge:* Thermal electric power plants, or "steam plants," whether fossil-fueled or nuclear-fired, require large amounts of water to cool and thereby condense the steam after it passes through turbine rotors. In this appeal, we must decide whether fossil-fueled steam plants that obtain their cooling waters from a major river system of the United States in a manner affecting its navigability are subject to the licensing jurisdiction of the Federal Power Commission (FPC) under Part I of the Federal Power Act, 16 U.S.C. §§ 791a-823 (1970).

Petitioners contend that the FPC has authority to license these plants; the Commission asserts, as it has since 1921, that it does not.

[1209] Petitioners [1] filed with the FPC on September 10, 1971,

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[1] Complainants Chemehuevi Tribe and Cocopah Tribe of Indians live on reservations along the Colorado River and assert an interest in the quality and quantity of the river waters. The Chemehuevi Tribe also claims it is threatened by air pollution from some of the plants in question. Complainant Sierra Club is a national organization interested in the conservation of unspoiled, wild, and scenic areas of the United States, and it claims that its particular interest in protecting the "unparalleled scenic and recreational attractions of the Southwestern United States" would be affected by the activities of the power plants. Complainant Committee to Save Black Mesa, Inc. is a nonprofit organization headquartered on the Navajo Indian reservation in Arizona that disseminates information regarding the consequences of power plants or mining activities near the reservation and is composed of persons residing on the reservation whose health, welfare, and esthetic enjoyment of the area allegedly will be adversely affected by the activities of the power plants in question. Complainants Emma Yazzie, Jimmy Yazzie, Paul Begay, Chester Hugh Benally, and Bill Begay are Navajo Indians residing on a reservation near the Four Corners

a complaint and petition for an order to show cause[2] requesting the Commission to require ten public utilities located in the southwestern United States[3] (in the so-called Four Corners area) to obtain licenses for six fossil-fueled plants being constructed along the Colorado River and its tributaries. The complaint asserted that the plants are part of a vast power pool being created in the southwestern United States by the utilities and that the energy generated within the pool will be transmitted in interstate commerce to load centers as far as 600 miles away. The six plants described in the complaint are: 1) the Four Corners Plant, located on the Navajo Indian Reservation near Farmington, New Mexico, which has five coal-fired generating units in commercial operation, a current installed capacity of 2,087 megawatts, and a proposed total capacity of about 6,000 megawatts,[4] and according to the complaint, withdraws about 34,000 acre feet of water per year from the San Juan River;[5] 2) the Mohave Plant, on the Colorado River three miles downstream from the Davis Dam in the southeast corner

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power plant, who claim that their health and welfare is severely threatened by the activities of that plant and the other plants.

[2] See 18 C.F.R. §§ 1.6(a), (d) (1972).

[3] The utilities are the Arizona Public Service Company, Southern California Edison Company, Public Service Company of New Mexico, Salt River Project, Tucson Gas & Electric Company, El Paso Electric Company, Los Angeles Department of Water & Power, Nevada Power Company, Utah Power & Light Company, and San Diego Gas & Electric Company.

[4] The sources of these figures are the complaint and the intervenor brief in this court, of eight of the named utilities.

[5] An acre foot of water is the amount required to cover one acre of land with one foot of water.

of Nevada, with two 750,000-kilowatt coal-fired units in commercial operation, which withdraws 30,000 acre feet of water per year from the Colorado River; 3) the Navajo Plant, under construction on the Navajo Indian Reservation four miles east of Page, Arizona, in the extreme north of Arizona, which will have three 770,000-kilowatt coal-fired units in commercial operation by the spring of 1976, and will withdraw 34,100 acre feet of water per year from Lake Powell, the reservoir created by the Glen Canyon Dam on the Colorado River in northern Arizona and southern Utah; 4) the Kaiparowits Plant, to be constructed on federally owned land in southern Utah about 20 miles north of Page, Arizona, with initial planned installed capacity of 2,000 megawatts and possible ultimate capacity of 6,000 megawatts, which will withdraw 102,000 acre feet of water per year from Lake Powell; 5) the San Juan Plant, under construction on federal land near Farmington, New Mexico, with planned initial capacity of 330,000 kilowatts and possible ultimate capacity of 990,000 kilowatts, which is scheduled to begin operation in the summer of this year and will withdraw 20,200 acre feet of water per year from the San Juan River; 6) the Huntington Canyon Plant, being constructed in part on federal land about 29 miles from Price, Utah, which will consist initially of one coal-fired unit of 430,000 kilowatts and will begin operation in 1974, with a second unit planned for 1977 and possibly two additional units thereafter, for a total possible capacity of 2,000 megawatts, and will withdraw 30,000 acre feet of water per year from Huntington Creek for use with the initial generating unit.

The complaint asserted that the Commission has licensing authority over the Four Corners plants under § 4(e) of the Federal Power Act, 16 U.S.C. § 797(e) (1970),*

* 16 U.S.C. § 797(e) (1970) provides, in pertinent part:

[Footnote continued on page 6]

because the utilities are constructing and operating "project works," *see* 16 U.S.C. §§ 796(11), (12) (1970),[7]

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[6] [Continued]

The commission is authorized and empowered—

. . .

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided:

[7] 16 U.S.C. §§ 796(11), 796(12) (1970) provide:

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dam and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and

for the development, transmission, and utilization of electric power across and along "navigable waters," *see* 16 U.S.C. § 796(8) (1970);[8] that the above-described withdrawals of water from the Colorado River system by the six power plants will affect the navigability of these navigable waters; that the Navajo and Kaiparowitz plants will use "surplus water," *see* 16 U.S.C. § 797(e) (1970),[9] impounded by a "government dam," *see* 16 U.S.C. § 796(10) (1970);[10] and that some of the six plants are or will be located on public lands or reserva-

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occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) "project works" means the physical structures of a project. . . .

[8] 16 U.S.C. § 796(8) (1970) provides:

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority; . . .

[9] *See* note 6 *supra*.

[10] 16 U.S.C. § 796(10) (1970) provides:

(10) "Government dam" means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others. . . .

tions of the United States, *see* 16 U.S.C. §§ 796(1), 796 (2)." After alleging that the six plants are likely to create severe air and water pollution, threaten the integrity of many natural, historical, and recreational resources, and disrupt the ecology and despoil the environment of the Four Corners region, the complaint stated that only a "single legal issue" was presented: "does the Federal Power Commission have licensing jurisdiction over steam plants generating and transmitting energy in interstate commerce, which withdraw large quantities of water from navigable streams for cooling and other plant purposes?" Because the plants were under construction and because only a question of law was involved, petitioners requested an expedited procedure and requested the FPC to order the utilities to show cause why they should not be required to suspend all development and construction of the plants pending the conclusion of this proceeding.

On their request the utilities were given until November 9, 1971, to file answers to the complaint. On October 18, 1971, the Utah Power & Light Company filed an answer denying most of the allegations of the complaint and moved to dismiss the complaint for failure to state a claim upon which relief could be granted, for

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" 16 U.S.C. §§ 796(1), 796(2) (1970) provide:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall include "reservations", as hereinafter defined;

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks; . . .

lack of subject matter jurisdiction, and for laches with respect to the Huntington Canyon Plant. Before any other answers were filed, however, the Commission on November 4, 1971, *sua sponte* issued an order dismissing the complaint for lack of jurisdiction.

In its order, the Commission stated that its licensing authority under Part I of the Federal Power Act extended to the licensing of "project works" and that thermal electric generating plants are not "properly classifiable" as project works within the meaning of 16 U.S.C. §§ 796(11), (12) (1970). This conclusion was based on brief references to the preamble of the Act as originally enacted in 1920, to the legislative history of the Act, to the long-standing FPC interpretation of its powers under the Act, and to the decision of the Supreme Court in *Federal Power Commission* v. *Union Electric Company*, 381 U.S. 90, 110 (1965) (the *Taum Sauk* case), all of which support the determination that the Commission has licensing authority over hydroelectric plants only, *i.e.*, plants generating electricity by water power.

On November 10, 1971, complainants filed an application for rehearing, pursuant to 16 U.S.C. § 825*l*(a) (1970). The application asserted that the structures and operations of the six plants came within the literal language of 16 U.S.C. § 797(e) (1970), because

> [t]he facts in this case demonstrate clearly that water conduits, power houses and transmission lines have been and are being constructed for the purpose of generating and transmitting electricity in interstate commerce; that surplus water from behind the Bureau of Reclamation's Glen Canyon Dam will be utilized for this purpose; and that much of the facilities in question will be and are located on public lands and reservations of the United States.

In addition, the application contended that consistent administrative failure to regulate was not conclusive of the jurisdictional issue because "consistent error is still error," *Phillips Petroleum Company v. Wisconsin*, 347 U.S. 672, 678 n.5 (1954), and that the lack of explicit jurisdictional authority in an agency's enabling statute does not preclude the agency from exercising jurisdiction when appropriate to the performance of the agency's function, *United States v. Southwestern Cable Company*, 392 U.S. 157 (1968). Finally, the application suggested that the statements in the *Taum Sauk* case about the lack of FPC jurisdiction to regulate steam plants were obiter dictum and thus not determinative of a subsequent proceeding squarely presenting the issue.

On December 10, 1971, the FPC issued an order denying the application for rehearing. Complainants then filed a petition in this court on December 14, 1971, to review the Commission's orders. *See* 16 U.S.C. § 825*l* (b) (1970).[12] By order dated February 4, 1972, the

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[12] Under 16 U.S.C. § 825*l* (b) (1970), "[a]ny party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the . . . United States Court of Appeals for the District of Columbia . . . ." Although it makes no practical difference in the result in this case, we observe that complainant Sierra Club does not have standing to seek review of the Commission's orders in this court because it has not satisfied the "injury in fact" test enunciated in *Sierra Club v. Morton*, 405 U.S. 727 (1972). Here, as in *Sierra Club*, the club

> failed to allege that it or its members would be affected in any of their activities or pastimes by the [Four Corners] development. Nowhere in the pleadings . . . did the Club state that its members use [the Colorado River system and the surrounding area] for any purpose, much less that they use it in any way that would be

utilities named in the complaint were allowed to intervene in these proceedings.

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significantly affected by the proposed actions of the respondents.

405 U.S. at 735. It is true that the decision in *Sierra Club* construed § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), which is not involved in this case. However, the language of § 313(b) of the Federal Power Act is identical to that of § 10 of the Administrative Procedure Act—both refer to a "party" who is "aggrieved" by agency action, *see Citizens Comm. for Hudson Valley v. Volpe*, 425 F.2d 97, 104 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970)—and the opinion in *Sierra Club* discussed cases arising under other judicial review statutes interchangeably with those involving only the Administrative Procedure Act. *See* 405 U.S. at 736-40 & n.14.

It is interesting to observe that 18 C.F.R. § 1.6(a) (1972) allows the filing of a complaint with the FPC by "[a]ny person . . . complaining of anything done or omitted to be done by any . . . public utility . . . in contravention of an act . . . administered" by the Commission. Thus, the Sierra Club had standing to initiate the licensing proceeding before the Commission, and it can be argued that this made it a "party" that was aggrieved when the FPC dismissed the complaint. However, the fact that a person is a party in agency proceedings does not require that he be allowed to seek judicial review of the agency's action; he must still satisfy judicial standing requirements. *See Pittsburgh & West Virginia Ry. Co. v. United States*, 281 U.S. 479, 486 (1930); 3 K. Davis, *Administrative Law Treatise* 241 (1958); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 728, 767 (1968). *But cf. Office of Communication of United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 359 F.2d 994, 1000 n.8 (1965).

I

At the outset, it is important to consider briefly the factual background of the problems presented by the issues in this case.

Although estimates of the precise rate of growth vary, it is undisputed that the demand for electric power—as well, of course, as that for other kinds of energy—is increasing at a staggering rate. According to one source,[13] consumption of electric power is growing by 9% per year, and demand for it is expected to double during each of the next two or three decades. The expected 250% increase in the demand for electric energy between 1970 and 1990 will require at least 255 new thermal-electric plants of 500,000 kilowatts to 2,000 megawatts capacity.[14] Ninety-one of these plants will be
[1213] fossil-fueled; 164 will be nuclear-fired.[15] Hydroelectric plants are not expected to play more than a very minor role in satisfying this burgeoning demand for electric power both because most of the good hydroelectric sites are being fully utilized and because thermal-electric plants

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[13] N. Fabricant & R. Hallman, *Toward a Rational Power Policy: Energy, Politics, and Pollution* 5 (1971). *See also* Ramey & Murray, *Delays and Bottlenecks in the Licensing Process Affecting Utilities: The Role of Improved Procedures and Advance Planning*, 1970 Duke L.J. 25, 31-32; Tarlock, Tippy & Francis, *Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions*, 45 S. Cal. L. Rev. 502 (1972); Comment, *Thermal Electric Power and Water Pollution: A Siting Approach*, 46 Ind. L.J. 61, 63 (1970).

[14] *See* Ramey & Murray, *supra* note 13, at 32 n.31, citing Energy Policy Staff, Office of Science and Technology, *Considerations Affecting Steam Power Plant Site Selection* 4 (1968); Smith, *Electricity and the Environment—The Generating Plant Siting Problem*, 26 Bus. Law. 169 (1970).

[15] *See* Ramey & Murray, *supra* note 13, at 34.

are more effective in producing the great quantities of electricity required.[11]

The manner in which thermal-electric plants generate electricity has been simply described as follows:

> Steam electric plants generate electricity by the thermo-dynamic process known as the Rankine Cycle. Heat produced by burning fossil fuel or nuclear materials turns water into steam. The steam passes through a turbine at high pressure and temperature, turning the turbine which in turn drives a generator to produce electricity. After leaving the turbine, the steam goes into a condenser, where the steam gives off its excess heat to the cooling water circulating in the condenser, is condensed to water and returned to the boiler or reactor to repeat the cycle.[12]

About two-thirds of the heat generated by burning the fuel source becomes waste heat that is absorbed by the cooling waters in the condenser,[13] and this results in a considerable elevation of the temperature of these waters. The heated water is then ordinarily returned directly to the water body from where it had been pumped into the condenser. This "once-through" cooling process for thermal-electric plants accounts for over 80% of the total cooling-water used nationally and almost one-third of the total water used for all purposes.[14] The tremendous projected growth in the production of thermal-electric power is expected to increase cooling requirements from 120 billion gallons a day in 1971, about 10% of the average daily runoff in the continental United States, to 200

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[11] *Id.* at 32; *see* FPC, *National Power Survey* 93 (1964).

[12] N. Fabricant & R. Hallman, *supra* note 13, at 73; *see* Comment, *supra* note 13, at 65.

[13] N. Fabricant & R. Hallman, *supra* note 13, at 52.

[14] *Id.*

billion gallons a day by 1980 and to 600 billion gallons a day by 2000, an amount equivalent to 50% of the average daily runoff in the United States.[17]

When the cooling waters are discharged directly into receiving water without having passed through cooling towers,[18] they may be 10 to 20 degrees (Fahrenheit) warmer than the receiving water.[19] Thermal discharges can cause severe damage to the aquatic ecosystems of the receiving waters.[20] If evaporative cooling towers are used to cool the waters leaving the condensers, the immediate environment may be adversely affected and large quantities of water may be permanently lost to the water source from which the cooling waters were obtained.[21]

In addition, fossil-fueled steam plants are notorious sources of air pollution. Nationally, they contribute about 50% of all sulfur oxides, 25% of all nitrogen oxides, and 25% of all particulate matter discharged into the at-

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[17] *Id.* at 52-53. Apart from the increase in the number of plants, much of this dramatic rise in cooling water requirements can be explained by the anticipated proliferation of nuclear-fired plants, which under present technology produce about 50% more heat than do fossil-fueled plants. *See id.* at 6, 53; Tarlock, Tippy & Francis, *supra* note 13, at 508; Comment, *supra* note 13, at 63-64.

[18] For a description of the operations of cooling towers, see Comment, *supra* note 13, at 71 n.25. Alternatives to direct heat discharge are discussed in *id.* at 71-72 n.25, and Tarlock, Tippy & Francis, *supra* note 13, at 509-10.

[19] N. Fabricant & R. Hallman, *supra* note 13, at 52.

[20] *See id.* at 53-55; Tarlock, Tippy & Francis, *supra* note 13, at 508-09; Comment, *supra* note 13, at 65-70.

[21] *See* Comment, *supra* note 13, at 71.n.25.

mosphere.[25] Moreover, the construction and operation of these huge complexes, the erection of hundreds of miles of overhead transmission lines, and the utilization of dams, pumps, and pipes in and along adjacent waterbodies disrupt the areas surrounding power plants.

We are told by petitioners that the six plants involved in this appeal have already had a significant detrimental impact in the Four Corners region and that this impact can be expected to become much more pervasive as all six plants become operational and plant capacity is increased. The environmental impact statement prepared by the Federal Bureau of Reclamation for the Navajo Project,[26] petitioners say, indicates that the six plants will evaporate most of the water they withdraw for cooling purposes. Thus, up to a quarter million acre feet of water would annually be withdrawn permanently from the Colorado River system, or over 2% of the 10-year average flow of the Colorado River at Lee Ferry, Arizona, of 12.1 million acre feet of water per year for the period 1958-67.[27] Petitioners claim that the projected increase in electric-power generation in the Colorado River basin will increase the permanent withdrawal to 5% by 1990. Petitioners also contend that studies and hearings by various state and federal officials have confirmed the

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[25] *See* N. Fabricant & R. Hallman, *supra* note 13, at 15; Tarlock, Tippy & Francis, *supra* note 13, at 510-12.

[26] *See* 42 U.S.C. § 4332(2)(C) (1970).

[27] *See* H.R. Rep. No. 1312, 90th Cong., 2d Sess. (1968), in 3 U.S. Code Cong. & Ad. News 3666, 3683-84 (1968). The average flow from 1891 to 1967 was 11 million acre feet, with a high of 24 million acre feet in 1917 and a low of 5.6 million acre feet in 1934. *Id.* By 1967 the Colorado River was already "over-committed" by contract, compact, and judicial decree, according to the House Committee on Interior and Insular Affairs. *Id.* at 3669-70.

assertions of area residents that the Four Corners plants are heavily polluting the air of the region in violation of state and federal standards and that other activities harmful to the environment including strip mining are being undertaken in conjunction with operating the plants.[1]

It is thus in the context of an increasing competition between the need for power and the importance of preserving public resources, between virtually unregulated growth and constraints required by concern for present-day and long-term environmental consequences, that we construe a statute that was enacted in an age in which the magnitude of these conflicts could not have been foreseen.

II

Petitioners contend that FPC jurisdiction is properly invoked under § 4(e) of the Federal Power Act for two reasons: either because the six plants identified in the complaint are "project works" necessary for the development of power along navigable waters or because the plants will utilize "surplus water" from Government dams. We will consider these contentions in turn.

A

It is true, as petitioners point out, that the literal language of § 4(e) appears to include steam plants. "Project," as defined in 16 U.S.C. § 796(11), means the complete unit of development of a power plant, including reservoirs and dams, and is not by its terms limited to hydroelectric plants. Under § 4(e), the Commission is empowered to license "project works"—the physical struc-
1215 tures of a project—necessary or convenient for the "de-

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[1] *See, e.g.*, Sen. Comm. on Interior & Insular Affairs, 92d Cong., 1st Sess., *Problems of Electrical Power Production in the Southwest* (Comm. Print 1971); Comment, *The Four Corners Power Complex: Pollution on the Reservation*, 47 Ind. L.J. 701, 705-08 (1972).

velopment, transmission, and utilization of power across, along, from or in" waterways over which Congress has jurisdiction. Again, there is no mention of "hydroelectric power" as such. Under the "ordinary man" or "plain meaning" cannon of statutory construction, petioners argue,[28] the utilities here are constructing facilities described by the Act, and there is, accordingly, no need to resort to legislative history or other extrinsic aids.[29]

In answering a similar argument, the Second Circuit has said:

> We reject this line of maxims of statutory construction in favor of Judge Learned Hand's more practical instruction that "[w]ords are not pebbles in alien juxtaposition," [*NLRB v. Federbush Co., Inc.*, 121 F.2d 954, 957 (2d Cir. 1941)] and therefore turn first to [the Act's] legislative history.[30]

Our role is to give effect to the intention of Congress as it may be discerned by reference to the historical background of the legislation as well as to the particular words chosen by the Congress to express its purpose.[31] The use of extrinsic aids such as legislative history to determine congressional purpose is appropriate not only when the words of the statute are ambiguous but also "when the literal words would bring about an end com-

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[28] *See, e.g., Malat* v. *Riddell*, 383 U.S. 569, 571 (1966); *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618 (1943).

[29] *See, e.g., United States v. Oregon*, 366 U.S. 643, 648 (1961); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947); *Calvert Cliffs' Coordinating Comm. v. United States AEC*, 449 F.2d 1109, 1126 (D.C. Cir. 1971).

[30] *Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686, 689 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971).

[31] *See, e.g., FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 126 (1960) (Black, J., dissenting).

pletely at variance with the purpose of the statute."[33] In our case, the history of the Federal Power Act, other provisions of the Act, developments occurring after its enactment, and the uniform (with one notable exception) expression of judicial and scholarly commentators compel the conclusion that the structures comprising thermal-electric plants are not "project works" required to be licensed by the FPC under § 4(e).

Part I of the Federal Power Act was enacted originally as the Federal Water Power Act in 1920.[34] It was the first federal legislation to provide for comprehensive management of the nation's waterways, and it was also the first federal attempt to regulate significantly the production of power.

The earliest federal efforts, which culminated in the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403
[1216] (1970),[35] were aimed at preventing obstruction of nav-

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[33] *United States v. Public Utilities Comm'n of Calif.*, 345 U.S. 295, 315 (1953); *cf. Preiser v. Rodriguez*, 411 U.S. 475, 488-491 (1973).

[34] A colorful and detailed account of the events preceding its passage is contained in J. Kerwin, *Federal Water-Power Legislation* (1926). *See also* Fly, *The Role of the Federal Government in the Conservation and Utilization of Water Resources*, 86 U. Pa. L. Rev. 274 (1938); Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 Geo. Wash. L. Rev. 9 (1945); Comment, 39 Mich. L. Rev. 976 (1941).

[35] 33 U.S.C. §§ 401, 403 (1970) provide:

§ 401. Construction of bridges, causeways, dams or dikes generally

It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same

igable waterways. To achieve this end, the Act of 1899 requires the approval of Congress, the Secretary of the Army, and the Chief of Engineers before any dam, bridge or similar facility can be constructed in navigable waters of the United States, and prohibits the obstruc-

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shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

§ 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

tion of these waters even by activities undertaken only on nonnavigable tributaries.[36] A parallel course of legislation granted rights of way over public lands for purposes of irrigation and the generation of electric power,[37] and in 1901 authorized the Secretary of Interior to grant revocable permits for "electrical plants, poles and lines for the generation and distribution of electrical power" on rights of way through the public lands and forests of the United States.[38] In practice, however, the Secretary did not bother to issue formal permits, and hydroelectric generating structures were routinely erected on public lands or along navigable waters. Bills awarding power sites were routinely introduced in Congress and routinely approved.[39] The notable exception was President Roosevelt's veto[40] of a bill that would have awarded Muscle Shoals, Alabama—which later became the nucleus of the Tennessee Valley Authority system—to private interests.[41]

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[36] Earlier legislation included the Rivers and Harbors Acts of 1880 (21 Stat. 197), 1884 (23 Stat. 133), 1888 (25 Stat. 424-25), 1890, (26 Stat. 426, 454), and 1892 (27 Stat. 110). *See* Starr, *Navigable Waters of the United States—State and National Control*, 35 Harv. L. Rev. 154, 171 (1921); Kerwin, *supra* note 34, at 105-08; *See FPC v. Union Electric Co.*, 381 U.S. 90, 99 (1965); *Union Bridge Co. v. United States*, 204 U.S. 364 (1907); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

[37] Act of March 3, 1891, ch. 561, § 18, 26 Stat. 1101, *as amended*, 43 U.S.C. § 946 (1970); Act of May 14, 1896, ch. 179, 29 Stat. 120, *as amended*, 43 U.S.C. § 957 (1970). *See generally* Kerwin, *supra* note 34, at 105-08.

[38] Act of Feb. 15, 1901, ch. 372, 31 Stat. 790, *as amended*, 43 U.S.C. § 959 (1970). This legislation superseded the legislation of 1896 (*see* note 37 and accompanying text). *Utah Power & Light Co. v. United States*, 243 U.S. 389, 407 (1917).

[39] Pinchot, *supra* note 34, at 11.

[40] *See* 36 Cong. Rec. 3071 (1903).

[41] *See* Pinchot, *supra* note 34, at 11; *see generally* Kerwin, *supra* note 34, at 58-110.

It should be observed at this point that hydroelectric power became a major power source in the United States about the turn of the 20th century because of the development of technology for the long-distance transmission of electricity. Before that time, steam power had become
717 the chief source of power in the United States,[42] and has remained so to the present day.[43] The development of commercially feasible techniques for the production of electricity in the 1870's, and the establishment of the first large-scale electric generating plants in the 1880's, did not inaugurate a rapid expansion of the electric power industry because the transmission of power by direct current was too inefficient over long distances. However, with the development of alternating current in the late 19th century, the problem of power loss over long distances was solved, and hydroelectric power sites on major rivers or public lands distant from large cities became common.[44] It was the escalating private appropriation of these sites that evoked the early federal regulatory initiatives.

Following the transfer of responsibility for the national forests to the Forest Service of the Department of Agriculture in 1905,[45] the Secretary of Agriculture began to

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[42] *See* Kerwin, *supra* note 34 at 13-57; Pinchot, *supra* note 34, at 9; *see also* note 124 *infra*.

[43] In *Udall v. FPC*, 387 U.S. 428, 445-47 n.11 (1967), the Court indicated that in 1960, hydroelectric power accounted for 3.9% of the energy requirements of the United States, nuclear power, 0.1%, and fossil fuels, 96%. By the year 2000, hydroelectric power is expected to provide only about 2% of our energy, nuclear power from 14% to 23%, and fossil fuels from 75% to 84%. *Id.* By 1990, nuclear plants will provide about one-fourth of our electric power. Comment, *supra* note 13, at 64 n.6. *See* note 130 *infra*.

[44] *See* Kerwin, *supra* note 34, ch. 1; 1 FPC, *National Power Survey* chs. 1, 2, 4, & 6 (1964).

[45] Act of Feb. 1, 1905, ch. 288, 33 Stat. 628, codified in 16 U.S.C. § 472 (1970).

issue permits for 50-year periods for rights of way in the forests for the generation and transmission of water power. A fee system was also established,[46] although the charges at first were hardly more than nominal. Nevertheless, permits were still granted as a matter of course, and power sites were still routinely awarded by Congress to private power interests. And no efforts were made to coordinate the many different uses of public lands and navigable waters for the purpose of promoting the comprehensive development of the major river systems in the public interest.

Beginning in 1906, the first halting steps in that direction were taken. The General Dam Act[47] of that year provided that, when Government permission was granted to construct a dam for water power or any other purpose in any navigable waters, the plans and specifications for the dam and "all accessory works" had to be submitted to the Secretary of War and the Chief of Engineers for approval. These two officials were expressly authorized to impose conditions on construction that were deemed necessary to protect the present and future interests of the United States, including the condition that the permittees construct structures "necessary in the interests of navigation." The Act was intended by its framers to permit the development of water power while facilitating the improvement of stream navigability by the Government through the utilization of private capital.[48]

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[46] *See United States v. Colorado Power Co.*, 240 F. 217 (D. Colo. 1916); Kerwin, *supra* note 34, at 77-78, 143-53; Pinchot, *supra* note 34, at 11-15.

[47] Act of June 21, 1906, ch. 3508, 34 Stat. 386.

[48] *See* Kerwin, *supra* note 34, at 113.

In 1910, the Act was amended [49] to provide that in
1216 acting on the plans submitted, the two above-named federal officials "shall consider the bearing of said struc-

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[49] Act of June 23, 1910, ch. 360, 36 Stat. 593. The Act in its amended form can be found in 33 U.S.C.A. at pp. 25-27. The amendment was inspired by President Roosevelt's vetoes of the Rainy River bill in 1908 (42 Cong. Rec. 1698 (1909) and the James River bill in 1909 (43 Cong. Rec. 978 (1909)) for the stated reasons, *inter alia*, that no charges or time limits had been set for these awards of permits for water power development in the named rivers. *See* Kerwin, *supra* note 34, at 115-30; Pinchot, *supra* note 34, at 16-17. In *FPC v. Union Electric Co.*, 381 U.S. 90, 98-99 n.11 (1965), the Court referred to the Rainy River veto as the "keynote" of "movement toward the enactment of" the federal Water Power Act of 1920, and it quoted the following passage from the President's veto message:

> "We are now at the beginning of great development in water power. Its use through electrical transmission is entering more and more largely into every element of the daily life of the people. Already the evils of monopoly are becoming manifest; already the experience of the past shows the necessity of caution in making unrestricted grants of this great power.
>
> "It should also be the duty of some designated official to see to it that in approving the plans the maximum development of the navigation and power is assured, or at least that in making the plans these may not be so developed as ultimately to interfere with the better utilization of the water or complete development of the power."

Besides the 1910 amendment to the General Dam Act, the vetoes may have also inspired passage of the Act of 1911, 36 Stat. 1253, that authorized the Secretary of Agriculture to grant 50-year easements over public lands, forests, and reservations for electrical poles and lines. *See* Kerwin, *supra* note 34, at 109. *Cf. United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206, 213 (1943). The presidential vetoes were themselves anticipated by the President's appointment of the Inland Waterways Commission in 1908 (S. Doc. No. 325, 60th Cong., 1st Sess. (1908)) to generate a comprehensive plan "designed for the benefit of the entire country. Such a plan

ture upon a comprehensive plan for the improvement of the waterway over which it is to be constructed with a view to the promotion of its navigable quality and for the full development of water power . . . ." The 1910 amendment also provided that the assessment of charges by the United States reflect the cost of maintaining the navigability of the affected river systems. Moreover, permits granted under the Act were made revocable and could not be granted for a period exceeding 50 years. At the expiration of the permit, the Government would pay the permittees the reasonable value of the dams and appurtenant works.

Despite these initiatives, however, the focus of federal efforts over the next few years remained on improving and maintaining the navigability of the major rivers. Thus, for example, the Weeks Act of 1911 [50] authorized the Secretary of Agriculture to acquire, upon recommendation of the National Forest Reservation Commission, denuded lands in the watersheds of headwaters of navigable waters to protect the navigability of those waters by making the lands available for reforestation.[51] The Government also engaged in sporadic efforts to impose the permit requirements of the 1901 legislation on power companies that had appropriated public lands for the building of hydroelectric facilities without seeking a fed-

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should consider and include all the uses to which streams should be put, and should bring together and coordinate the points of view of all users of waters." 12 Cong. Rec. 6968 (1908).

[50] 36 Stat. 961, codified in 16 U.S.C. §§ 480, 500, 513-19, 521, 552, 563 (1970).

[51] *See Young v. Anderson*, 160 F.2d 225 (D.C. Cir.), *cert. denied*, 331 U.S. 821 (1947); *United States v. Griffin*, 58 F.2d 674 (W.D. Va. 1932).

eral license,[52] and to require the payment of fees as a condition to retaining licenses previously issued.[53]

A congressional battle between private power interests and conservationists was touched off by the attempt of the former in July, 1912, to secure House of Representatives' approval of an Omnibus Water Bill that would have authorized the construction of seventeen major dam projects with no provision for a charge or other regula-
[1219] tion by the Government.[54] The bill was eventually de-

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[52] *See Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917).

[53] *See United States v. Colorado Power Co.*, 240 F. 217 (D. Colo. 1916). By 1915, the Government was collecting about $89,000 in administrative charges assessed for development of water power on the national forests. *See* Kerwin, *supra* note 34, at 202.

[54] *See* H.R. Rep. 1050, 62d Cong., 2d Sess. (1912). The conservationists, led by men such as Gifford Pinchot, head of the Forest Service under President Roosevelt and later Governor of Pennsylvania, decried what they saw as a great giveaway of the Nation's water resources to private interests and a callous disregard of the interest of the public in a comprehensive system of water management that would benefit the public at large. *See* Pinchot, *supra* note 34, at 11-20. Pinchot referred to private interests as "water power grabbers" (*id.* at 16) who were "eager for plunder," (*id.* at 18) and he characterized the battle as one "between private greed and the public good" (*id.*). *See generally* Kerwin, *supra* note 34, *passim;* Fly, *supra* note 34, at 291-92. These conservationists were concerned about the growing use of fossil fuels in the generation of other types of power, and they desired to encourage the growth of water power, under federal auspices, because of their perception of hydroelectricity as a virtually limitless—and cheap—source of power. Caught up as well in the rising public tide against private monopolization of the means of production, they sought to protect the right of the public to the power potential of water. As the House Report accompanying the Adamson Bill (*see* note 61 *infra*) put it:

[Footnote continued on page 26]

railed by President Taft's veto of the Coosa River bill on August 24, 1912, because the latter contained no provision for charging the permittee for the privilege of

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[Continued]

> Experience has taught us that in the past the private monopolization of natural opportunities has not only deprived the general public of their natural right to a proper share of the benefit which should accrue from them, but such monopolization has given to those possessing it a preponderance [*sic*] of influence and of power in our industrial and civic life which is little short of a menace to our institutions.
>
> We have awakened none too soon to the necessity of preserving under public control these great natural opportunities for the creation of wealth, which belong to the public and which could constitute a serious source of danger to equal liberty and fair opportunity if transferred in perpetuity to private ownership.

H.R. Rep. No. 842, 63d Cong., 2d Sess. 11 (1914).

The opponents of the conservationists were those who believed that only the private development of the nation's water power resources could exploit those resources to a degree that would benefit the public, those who were against increasing centralization of government or increasing federal intervention in what they perceived to be essentially local or private affairs, and, of course, those who saw the private, unregulated generation of hydroelectric power as a profitable enterprise. *See* Kerwin, *supra* note 34, at 153-57 *passim;* Fly, *supra* note 43, at 289-90. Both groups agreed, however, that the existing system of federal regulation was undesirable because of its piecemeal approach and its generally restrictive effect on the large-scale development of water power.

The Dam Acts of 1906 and 1910 were considered inadequate by many because, although they did provide for charges, no fees were exacted for the privilege of obstructing navigable waters; permittees were merely required to compensate the Government for the costs of restoring prior conditions of navigability and for benefits provided by Government improvements. And, investment under the Acts was seen to be a risky proposition because of uncertainty about the disposition of the properties after 50 years had expired and because Con-

building the dam. However, the battle lines had been drawn.[55] In all the legislative debates that followed, the primary line of demarcation between the opposing forces was this question of imposing charges on private developers of water power for being allowed to undertake such development.[56] The power interests, whose main influence lay in the Senate, argued that the federal government could not constitutionally charge a private developer for the privilege of generating water power on a navigable waterway if the United States had no interest in the surrounding lands and had made no expenditure itself for improvements at the development site. The conservationists, represented primarily in the House, countered with the argument that Congress could impose conditions on any grant of authority by it to obstruct navigable waters, and, since the Government could itself generate and sell water power at works it

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gress reserved the right to repeal or modify the Act without liability. *See* Kerwin, *supra* note 34, at 130. Although water power development on navigable streams had come to a standstill by 1912, development on the public lands, especially in the West, actually exceeded demand during this period. *See id.* at 39-42, 155-56.

An interesting expression of the point of view of the power interests can be found in Brown, *The Conservation of Water-Powers*, 26 Harv. L. Rev. 601 (1913), in which the author takes the position that the best way to "conserve" the nation's water power resources is to encourage private water power development. *See id.* at 604. *See also* Shields, *The Federal Power Act*, 73 U. Pa. L. Rev. 142 (1924).

[55] 48 Cong. Rec. 11796 (1912); *see* S. Doc. No. 949, 62d Cong., 2d Sess. (1912).

[56] *See* Kerwin, *supra* note 34, at 130-42; Pinchot, *supra* note 34, at 17-18.

[57] *See* Kerwin, *supra* note 34, at 79-98, 171-260.

constructed to facilitate navigation,[58] it could license a private company to develop the power in its stead, and could exact a reasonable fee as compensation for the license.[59] For our purposes, it is interesting to observe that the proponents of charges pointed out that steam plants were more expensive to operate than water power plants, and that therefore if a state public service commission fixed a flat rate to be charged by electric utilities, the water power plants would make excess profits. They argued that a federal charge on hydroelectric plants could result in those excess profits being used for the development of navigation. Thus, the contemplated charge for the privilege of developing hydroelectric power was seen as a way of equalizing the costs of hydroelectric and steam power, and thereby insuring that the rates paid by consumers would be equal.[60] It was this view, of course, that eventually prevailed.

Over the next few years, several bills were introduced in Congress by the respective factions, but none was able to pass both houses.[61] However, in 1920, a Wilson

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[58] *See United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1908); notes 167-70 *infra* and accompanying text.

[59] *See* Kerwin, *supra* note 34, at 95-98.

[60] *See* 52 Cong. Rec. 10450 (1916); Kerwin, *supra* note 34, at 199-200.

[61] A number of bills reflected the key philosophical differences between the power interests and the conservationists, as they differed substantially on the questions of charges, Government recapture, and the extent of Government regulation of plant operations: The Adamson Bill, which related to water power development on navigable waters, H.R. 16053, 63d Cong. 2d Sess. (1914); the Ferris Bill, which was concerned with the question of water power development on the public lands, H.R. 16673, 63d Cong., 3d Sess. (1914); H.R.

administration bill regulating the construction of water power projects on navigable waters, public lands, and
[1221] forest reserves was introduced.[62] The recent war, and

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408, 64th Cong., 1st Sess. (1916); the Myers Bill, which was the response of the power interests to the original wording of the Ferris Bill, H.R. 16673, 63d Cong., 3d Sess. (1914); S. 2399, 65th Cong., 1st Sess. (1917); *see* Hearings before the Sen. Comm. on Public Lands on H.R. 16673, 63d Cong., 3d Sess. (1914); and the Shields bill, S. 3331, 64th Cong., 1st Sess. (1915); S. 1419, 65th Cong., 1st Sess. (1917). For a discussion of the bills and the legislative debates, *see* Kerwin, *supra* note 34, at 172-216. The water power interests lobbied very heavily for the Shields Bill, and much of their considerable influence during this period was a consequence of their press campaign for the need of immediate development of water power for the manufacture of nitrates necessary for ammunition for the impending war. But the Shields Bill, like the others, was never passed by more than one house. *See id.* at 207-10.

[62] In 1917, President Wilson had directed his Secretaries of War, Interior, and Agriculture to prepare a similar bill. The Bill, H.R. 8716, 65th Cong., 2d Sess. (1918), that was ultimately prepared and referred to a special House committee on water power contained most of the provisions of the bill that was finally enacted in 1920. The letter of transmittal accompanying certain amendments to the bill offered by the Secretaries reiterates many of the arguments that had been raised in favor of extensive federal water power regulation:

WASHINGTON, FEBRUARY 27, 1918.

Hon. T. W. Sims,
House of Representatives.

Dear Mr. Sims:

It is understood your committee will take action at an early date upon various proposals which have been made concerning water-power legislation. On account of

the conditions now affecting the power industry and the need of maintaining our entire industrial machinery at its highest efficiency, a satisfactory solution of the water-power problem is, in our judgment, one of the most important steps for the consideration of this Congress and one which should receive attention at the earliest possible date.

The industrial expansion which has been necessary in order to produce the materials and equipment needed in the prosecution of the war has placed unprecedented demands upon the electric power industry, to such an extent in fact that the output of commercial central stations has increased more than 60 per cent since 1914. This increase has been greatest in the manufacturing sections of the East where water-power development is comparatively limited, and has been chiefly in the form of steam-generated power, because steam power can be developed more quickly and at less capital cost than water power. This increase in power output has taken place notwithstanding advances in costs of construction and of operation.

While the form of bill which has been presented for your consideration is directly concerned with water-power development only, an adequate solution of this problem will have a favorable and stabilizing effect upon the whole power industry. Probably no considerable increase in new water-power development can be expected immediately, but legislation is urgently needed in order to put existing water-power developments, which have been made under inadequate law, into a position of security which will enable them to make extensions and to meet maturing obligations upon favorable terms.

There is also need of legislation in order that time may be given to prepare for the developments that must take place after the close of the war, if the United States is to maintain its proper place in world trade, or even to supply its domestic needs. A survey of water-power resources is needed, particularly with relation to

specific districts and specific industries. The various establishments of the Federal Government which have had to do with the administration of water power should be coordinated through a single agency, and as far as practicable all agencies, federal, state, and private, should be brought into cooperation. It is urgently recommended that a federal power commission be established as provided in the proposed bill and be given ample authority to undertake this work of preliminary investigations.

Beyond the need of power development as such is the need of increasing the proportion of water power in order to reduce the drain on our coal and petroleum supplies, particularly the latter. Even if the coal supply were unlimited, the reduction in the demands upon labor and transportation equipment would be sufficient reason for substituting water power for steam power whenever possible. The petroleum supply particularly in the West where the greatest proportion is used for fuel, is being rapidly depleted, consumption has exceeded production and stocks in storage are fast disappearing. With the substitution of water power for steam power in central stations and with the electrification of railroads, a large part of the use of petroleum for fuel could be eliminated.

Water-power legislation should have in view not only the maintenance of the rights of the public in the national resources, but also the adequate protection of private capital by which such resources are developed. The bill before you aims to do both.

. . .

Very truly yours,

NEWTON D. BAKER,
Secretary of War.

FRANKLIN K. LANE,
Secretary of the Interior.

D. F. HOUSTON,
Secretary of Agriculture.

[Footnote continued on page 32]

what was seen as the inadequacy of the nation's exploitation of its resources in preparation for the war, gave additional impetus to the drive for effective water power regulation,[63] and, after compromise between the houses

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[62] [Continued]
Quoted in Kerwin, *supra* note 34, at 225-28 (emphasis added). However, after a vigorous debate over its recapture provisions and a House-oriented reconciliation of the bill with the Shields Bill in a conference committee, H.R. Rep. 1147, 65th Cong., 3d Sess. (1919), it fell victim to a Senate filibuster as the 65th Congress closed on March 5, 1919. *See* Kerwin, *supra* note 34, at 217-55; *see also FPC v. Union Electric Co.*, 381 U.S. 90, 102 n.18 (1965).

The bill was reintroduced in the House at the start of the next session, and it passed the House with minor changes in July 1919.

[63] Secretary Houston, in his report to the House, stated:

> The exigencies of war brought to light defects in our national utilization of power which had not been fully realized. Operating under statutes enacted when the electrical industry was in its infancy, we had permitted our vast water-power resources to remain almost untouched, turning to coal and oil as the main source of power; for steam power could be developed more quickly and easily with fewer legal restrictions and with greater security to the investment. Probably not less than 85 percent of the power used in this country for domestic, public, and industrial purposes and for the operation of railroads is produced from coal and fuel oil. Not only are water powers relatively unused, but we are yet far from accomplishing the economies which are practicable in the development of steam power. While individual steam stations have reached a high degree of mechanical efficiency, we have failed to realize the group efficiency of many stations operating in a system and we still pursue the crude method of transporting steam power by rail in its raw state as fuel instead of transmitting it over wires in its developed state as electrical energy.

> The power requirements of this country will not be met until we develop our water powers, tie them in with steam plants located at the mine itself and operate all in great interstate systems. These considerations were presented before the special committee of the House of Representatives in the hearings held on the water-power bill during the last Congress. The need of adequate legislation is no less urgent now.
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> H. R. Rep. No. 61, 66th Cong., 1st Sess. 5 (1919).

See also the remarks of Senator Jones introducing the bill:

> If 10 years ago, instead of enacting restrictive laws which have prohibited development of our water powers, Congress had invited their development through fair and reasonable terms, the beginning of the World War would have found the United States with 20,000,000 developed hydroelectric power instead of 5,000,000. Indeed, it is not too much to say that Germany would have hesitated before entering the conflict with probability of having to face a Nation possessing such an enormous amount of harnessed physical force wherewith to back up its armies. As it was, the beginning of the Great War found us short of coal, short of oil, short of power, and half a billion dollars was expended inside of two years in the erection of steam-power plants, many of which, built haphazard under war-time stress, are now useless owing to unfavorable location. Through failure of Congress to pass water-power laws under which money could be safely invested with prospect of a full return, water powers now wasting have been held back from development in at least 22 States of the Union.
>
> 59 Cong. Rec. 241 (1919)

There was also concern that the nation's river systems had proved inadequate to maintain wartime transportation burdens. *See* Fly, *supra* note 34, at 279. And, the old arguments about the efficiency and inexhaustibility of water power were also trotted out. *See* report of Secretary Houston, *supra*, and remarks of Senator Jones:

[Footnote continued on page 31]

[1222] on questions relating to the amount of Government charges and the wording of the recapture provision,"

[Continued]

The report of the Geological Survey shows that our consumption of coal for all purposes during the year 1913 was about 100,000,000 short tons, of which the railroads alone used about 30 percent. This tremendous tonnage requires for mining and transportation the labor of 1,500,000 men and the use of over 1,000,000 freight cars and 40,000 locomotives. In addition to this the petroleum used in 1913 was equivalent to 24,000,000 tons of coal. Every water horsepower now going to waste which could be economically substituted for fuel power would represent approximately 5½ tons of coal per year, based on an average of 12 hours per day. The labor of one man is released for other uses every time 50 hydroelectric horsepower is developed, and every 150 water horsepower developed releases one freight car for other duty

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The utilization of even one-third of the enormous amount of energy latent but now wasting in our falling waters would make the United States the greatest manufacturing country of the world. The development of our water powers is intimately connected with the solution of such great national problems as the national defense; extension of inland waterways; shortage of food; conservation of coal, oil, and labor; irrigation of arid lands; and railroad car shortage. In addition to conserving vast quantities of coal and labor to mine and handle it, the hydroelectric energy existing in our running waters will, when developed, be utilized in the manufacture of explosives, fertilizers, wood pulp and paper, electrochemicals, copper and aluminum, and in other industrial applications.

59 Cong. Rec. 241-242 (1919)

" *See* H.R. Rep. 910, 66th Cong., 2d Sess. (1920); Kerwin, *supra* note 34, at 255-63.

the bill was passed by both houses and signed by President Wilson on June 11, 1920.

Thus was born the Federal Water Power Act of 1920, which "established firmly the principle of federal regulation of water power projects [and] . . . established a national policy in the use and development of water power on public lands and navigable streams." [64] The history of the Act shows beyond any doubt that the only [1223] segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydroelectric power. Accordingly, as the Supreme Court has recognized, "the central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power—uses which, while unregulated, might well be contradictory rather than harmonious. . . . The principal use to be developed and regulated in the Act, as its title indicates, was that of hydroelectric power to meet the needs of an expanding economy." [65]

The Act itself, of course, was entitled the Federal Water Power Act; it could just as easily have been called the Federal Power Act (as it subsequently became),[66] or the Federal Water Resources Act, or some other name not indicating so specifically that the major use to be developed and regulated was the generation of hydroelectric power. The preface to the Act states:

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[64] Pinchot, *supra* note 34, at 19.

[65] *FPC v. Union Electric Co.*, 381 U.S. 90, 98-99 (1965); *see First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 180-81 (1946).

[66] *See* notes 83-86 *infra* and accompanying text.

> An Act to create a Federal Power Commission; to provide for the improvement of navigation; *the development of water power*; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes."[8]

It is true, as petitioners point out, that statutory headings of complicated acts can provide no more than a very general guide and cannot limit the plain meaning of the statutory text.[9] But it does not follow that the regulation of steam plants can be subsumed under the words "and for other purposes" in the preface, which explicitly recites the broad, fundamental purposes of the Act.[10] We agree with intervenors that it is unlikely that, if Congress had intended to include the regulation of thermal-electric generation as a basic purpose of the Act, it would have limited reference in the preface to hydroelectric power—the lesser utilized of the two sources of electric power generation. The explicit reference to only hydroelectric power is consistent with the legislative history of concern with promoting the "comprehensive development of water power."[11]

Other provisions of the Act bear this out. For example, § 4(a), 16 U.S.C. § 797(a), authorizes the Commission to make investigations concerning the utilization of water resources of regions to be developed, concerning "the water-power industry and its relation to other industries and to interstate and foreign commerce," and concerning the location, capacity, development costs, and relation to markets of power sites—again, only water

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[8] 41 Stat. 1063 (emphasis added).

[9] *See Bhd. of R. Trainmen v. B. & O. Ry.*, 331 U.S. 519, 528-29 (1947).

[10] *See FPC v. Union Electric Co.*, 381 U.S. 90, 100-01 (1965).

[11] *FPC v. Union Electric Co.*, 381 U.S. 90, 101 (1965).

power is singled out for study. Section 10(a), *as amended*, 16 U.S.C. § 803(a), provided that licenses issued under the Act be issued on the condition that the projects adopted "shall be such as in the judgment of the commission will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, *of water-power development*, and of other beneficial public uses . . . ." (Emphasis added.) The proviso to § 24, *as amended*, 16 U.S.C. § 818, accorded retroactive application to that section's provision for the protection of licensees in their utilization of public lands for which application had been made for use in constructing "water power" facilities.

[1920]. In recognition of the intent of Congress as expressed in the Act, the newly created Commission in its first annual report determined that its licensing jurisdiction extended only to construction of water power projects. In two opinions contained in that report, the Commission determined that it did not have licensing jurisdiction over either the construction of a dam in tidal waters for the purpose of allowing bathing and boating "and to cover unsightly flats" or the stringing of transmission lines because neither project was connected with the development of water power.[7] Elsewhere in that report, the Commission described its licensing jurisdiction as follows:

> "On neither the public lands and reservations nor on the waters of the United States is the jurisdiction of the Federal Power Commission as broad as the jurisdiction of Congress. The latter has authority over all forms of use; *the Commission is limited to the consideration of projects designed to produce water power.* Structures or diversions having any other purpose, unless incidental to works constructed for power purposes or a necessary part of a com-

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[7] *See* FPC, *First Annual Report* 138, 155 (1921).

> prehensive scheme of development, are not within the jurisdiction of the Commission." [73]

The Commission has adhered to this position consistently since 1921.[74]

We are told by petitioners, however, that this administrative interpretation of the Commission's jurisdiction is entitled to no weight because "consistent error is still error." [75] We are told that "the unadorned language of the Act" [76] is more significant than Commission interpretation; that administrative construction must yield to the "plain language and overall scheme" of the Act; [77] and that the jurisdictional judgment in this case does not require the kind of analysis of technical facts that would require us to defer to administrative expertise.

We have already indicated our disagreement with petitioners' argument that we need look no further than the language of §§ 3 and 4 of the Act to hold that the FPC has licensing jurisdiction over steam plants, and we discuss *infra* their contention that the purpose of the Act requires that we so hold even if the language does not.[78] Because the "unadorned language" of the Act, moreover,

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[73] *Id.* at 51-52 (emphasis added).

[74] *See, e.g.*, 1962 Annual Report of the FPC 12-13; 1966 *id.* at 8-9; 1 FPC, *National Power Survey* 100-01 (1964).

[75] *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678 n.5 (1954); *Nantahala Power & Light Co. v. FPC*, 384 F.2d 200, 206 n.12 (4th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

[76] *Nantahala Power & Light Co. v. FPC*, 384 F.2d 200, 206 (4th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

[77] *See, e.g., County of Marin v. United States*, 356 U.S. 412, 420 (1958); *United States v. New England Coal & Coke Co.*, 318 F.2d 138, 143 (1st Cir. 1963).

[78] *See* part II. B. *infra*.

does not compel the interpretation for which petitioners contend, consistent administrative construction to the contrary commands our respect; indeed, it is entitled to "great weight." [79] "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" [80]

[1225] It is not without significance, moreover, that this administrative interpretation was transmitted directly to Congress the year after passage of the Act, and that the only two significant amendments to the Act over the following fourteen years, including a reenactment of the Act in 1935, gave no hint of congressional desire to override the Commission's construction of the scope of its jurisdiction.[81] In 1930, a Reorganization Act was enacted [82] to improve the functioning of the Commission by making it independent and able to employ its own full-time staff. In 1935 the Water Power Act was amended by Title II of the Public Utility Act of 1935 [83] and was made part I of the Federal Power Act. The 1935 Act

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[79] *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972).

[80] *Power Reactor Dev. Co. v. Electrical Workers*, 367 U.S. 396, 408 (1961); *see Udall v. Tallman*, 380 U.S. 1, 16 (1965); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

[81] *Cf. Pacific Power & Light Co. v. FPC*, 184 F.2d 272, 275 (D.C. Cir. 1950).

[82] 46 Stat. 797, codified in 16 U.S.C. §§ 792, 793, 797(d) (1970).

[83] 49 Stat. 838, *as amended*, 16 U.S.C. §§ 792-823 (1970). *See* DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 Geo. Wash. L. Rev. 30, 30-38 (1945).

added parts II [49] and III [50] to the Act to regulate the interstate transmission and sale of electricity. The deletion of the word "Water" from the title reflected the expanded duties of the Commission under parts II and III; the original Federal Water Power Act was virtually unchanged.[51] It would have been a simple matter for Congress to have rejected the Commission's construction of its licensing powers by adding clarifying amendments to § 4(e) or to § 3. By reenacting unchanged the material provisions of the Act with knowledge of the contemporaneous construction placed upon the Act by those charged with its administration, Congress can be said to have indicated its satisfaction with that construction.[52]

[49] 49 Stat. 847, *as amended*, 16 U.S.C. §§ 824-824h (1970).

[50] 49 Stat. 854, *as amended*, 16 U.S.C. §§ 825-825u (1970).

[51] As the House report explained:

> The amendments to the present Federal Water Power Act are all minor. They have been requested by the Federal Power Commission, largely for the purpose of clarifying the act in its application to situations that have arisen in its administration, and also to strengthen it in certain particulars . . . .

H.R. Rep. No. 1318, 74th Cong., 1st Sess. 7 (1935). The major changes were made in §§ 4 and 23 of the Act, relating to Commission licensing authority over hydroelectric projects on nonnavigable waters but affecting interstate commerce. *See FPC v. Union Electric Co.*, 381 U.S. 90 (1965); *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 172 n.17 (1946); Sen. Rep. No. 621, 74th Cong., 1st Sess. 43 (1935).

[52] *Cammarano v. United States*, 358 U.S. 498, 510-11 (1959); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958); *United States v. Wyoming*, 331 U.S. 440, 452-53 (1947); *cf. FPC v. Union Electric Co.*, 381 U.S. 90, 110-12 n.30 (1965); *id.* at 112 n.1 (Goldberg, J., dissenting). *But see Safe Harbor Water Power Co. v. FPC*, 124 F.2d 800, 808 (3d Cir.), *appeal dismissed*, 313 U.S. 546 (1941).

Consistent judicial interpretation also requires us to reject petitioners' argument that the Act extends the Commission's licensing jurisdiction to steam plants.

The Supreme Court's first significant discussion [49] of the history and purpose of the Federal Water Power Act occurred in 1946 in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, in which the Court held that an applicant for a license under the Act did not have to obtain first a state permit and satisfy state requirements relating to the diversion of water from waterways determined to affect the commerce interests of the United States. The Court observed that the Act, when read in the light of its legislative history, disclosed "a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation" by exercising its power over commerce and the public lands to foster the "development of the navigable waters of the United States." [50] The "greatest step" taken by the Government in pursuit of this goal was the provision in the Federal Water Power Act for 50-year licenses "for the development of water power in the navigable waters of the United States." [51] Citing approvingly an article by Gifford Pinchot, [52] one of the major figures in the conservationist movement,

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[49] The Court did consider several earlier cases involving various aspects of the Act. *See United States v. Appalachian Power Co.*, 311 U.S. 377 (1940); *Broad River Power Co. v. Query*, 288 U.S. 178 (1933); *Henry Ford & Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369 (1930); *New Jersey v. Sargent*, 269 U.S. 328 (1926).

[50] For application of this principle to water power projects on public lands, *see FPC v. Oregon*, 349 U.S. 435 (1955).

[51] 328 U.S. at 171-72.

[52] 328 U.S. at 172 n.17.

[52] Pinchot, *supra* note 34, at 19.

the Court briefly reviewed the history of the Act and characterized it as "distinctly an effort to provide federal control over and give federal encouragement to water power development."[93] The Court described the general purposes of the Act as follows:

> It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.
>
> It was a major undertaking involving a major change of national policy. That it was the intention of Congress to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation is apparent from the provisions of the Act . . . .[94]

Six years later, the Court held that the Commission's duty of conserving water power resources and of developing comprehensive plans for waterways justified the Commission's imposition of the condition that a licensee permit the United States to interconnect its transmission lines with those of the licensee for the transfer of power generated in plants owned by the Government.[95] That same Term the Court held that congressional approval of a general plan for development of a river system did not deprive the Commission of jurisdiction under the Federal Power Act to decide whether private construction might be preferable to public development of water power

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[93] 328 U.S. at 180 n.23.

[94] 328 U.S. at 180-81.

[95] *FPC v. Idaho Power Co.*, 344 U.S. 17, 22-24 (1952).

sites within the system."[4] In describing the scope of the Commission's authority, the Court said:

> Extensive review of the need for integration of federal activities affecting waterways . . . and of the breadth of authority granted to the Commission by Congress in response to the need is hardly necessary to establish the role of the Commission in hydroelectric power development. *See, e.g., First Iowa Coop. v. Power Comm'n*, 328 U.S. 152, 180, 181, and cases cited. From the time that the importance of power sites were brought to public and congressional consciousness during the administration of President Theodore Roosevelt, the significant development has been the devising of a general power policy instead of *ad hoc* action by Congress, with all the difficulties and dangers of local pressures and logrolling to which such action gave rise."[5]

In 1965, the most important, for our purposes, Supreme Court discussion of the language, history, and purpose of the Federal Water Power Act occurred in *FPC v. Union Electric Company*, 381 U.S. 90. In that case, the Court held that a license was required under the Act for the construction of a pumped-storage hydroelectric plant[6] that was to be located along a nonnavigable tributary of a navigable stream, would have no effect on the navigability of the main stream, but would generate electricity for interstate transmission. Congress,

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[4] *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953).

[5] 345 U.S. at 167-68.

[6] A pumped-storage plant uses energy from other sources, usually steam plants, to pump water from a low pool or other water source to a higher pool during periods of low electricity demand. During peak periods, the water from the higher pool is released down into the lower pool, and the falling water generates electricity just as in conventional hydroelectric establishments. *See FPC v. Union Electric Co.*, 381 U.S. 90, 92 & n.3 (1965).

the Court stated, had intended to draw on its full power under the Commerce Clause and not merely its authority over navigable waters in making it unlawful in § 23(b), 16 U.S.C. § 817, to construct unlicensed project works that would affect "the interests of interstate or foreign commerce." After briefly reviewing the history of the Act, citing the *First Iowa* case, *supra*, and stating that the principal use to be regulated in the Act "was that of hydroelectric power to meet the needs of an expanding economy," [*] the Court explained why hydroelectric plants situated on nonnavigable waters and generating electricity in interstate commerce were subject to the Act but steam plants located on navigable waters were not:

> The respondent asserts that an anomalous consequence flows from the Commission's construction of the Act and its view that steam plants generating large amounts of energy for interstate transmission are not within the scope of § 23(b), although located along a stream over which Congress has jurisdiction. Since the Commission's jurisdiction here rests solely on the interstate transmission of energy, there can be no basis for distinguishing between a steam plant and a hydroelectric facility both generating energy for interstate use. The Court of Appeals, after noting that the generation of electric energy is a local or intrastate activity, concluded from this argument that "[t]he Commission's jurisdiction . . . must logically rest upon its delegated congressional jurisdiction over the interests of commerce on navigable waters." 326 F. 2d, at 551. On this reasoning either the Act should, but does not, require a license for a steam plant when situated on the navigable mainstream itself, or should not, but does, require a license for a hydroelectric plant, pumped storage or otherwise, situated on the mainstream but which has no demonstrable effect, or a beneficial effect, on navigability. The answer to this conundrum is that unlike Part II of Title II of the Public Utility Act of 1935, under which the Commission regulates var-

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[*] 381 U.S. at 99.

> ious aspects of the sale and transmission of energy in interstate commerce, Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission.[100]

The three dissenting Justices, disagreeing with the Court's broad reading of the commerce interests intended to be protected by the licensing provisions of the Act, did not believe that the "anomaly" created by exemption of steam plants on navigable waters could be so easily explained away:

> However, even in terms of the "power potential in water," I fail to find a relevant distinction between a plant which artificially pumps water to an elevated reservoir in off-peak periods allowing it to fall and generate electricity at peak periods and a plant which heats water to create steam which generates electricity. I see no purpose of the Act that justifies producing this anomaly in the regulatory scheme. Under my view, of course, when interstate or foreign commerce is affected, Congress can constitutionally require licenses of both steam and hydroelectric projects, of either steam or hydroelectric projects, or of neither. *The legislative history here, however, establishes to my satisfaction that it has required licenses of neither steam plants nor the type of hydroelectric plant here involved*, and in light of this legislative history I agree with the Court of Appeals that Congress intended that a license be required only where the interests of commerce on navigable waters are affected.[101]

Thus, all nine Justices agreed that the FPC had no licensing jurisdiction over steam plants; they disagreed

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[100] 381 U.S. at 109-10 (footnotes omitted).

[101] 381 U.S. at 114-15 (Goldberg, J., dissenting) (footnote omitted) (emphasis added).

about the inference to be drawn from this for purposes of determining Commission jurisdiction over water power plants on nonnavigable waters.[102] It may well be, as petitioners contend, that this obiter dictum in the *Taum Sauk* case constituted an unsupported assumption for purposes of argument, that nonadversary determinations do not have the force of law,[103] and that the Court did not have before it the figures cited *supra*[104] indicating the tremendous impact modern steam plants have on the flow and thereby the power potential in the waterways on which they are located. It is significant, however, that the entire Court was in agreement that neither the language nor the history of the Act required the conclusion that the Act was intended to afford the FPC jurisdiction over steam plants. At the least, the dictum in the majority opinion and the statement in the dissent emphasize the weakness of petitioners' argument that the "unadorned language" of § 4(e) is alone sufficient to preclude resort to extrinsic aids and to require reversal of the dismissal order of the FPC.

The lower federal courts, with the exception of the Eighth Circuit in the *Taum Sauk* case[105] have not squarely faced the question presented by this case. Moreover, we have found no case in which a court, by dictum or otherwise, has suggested that the Federal Water Act

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[102] The Eighth Circuit agreed with the dissenting Justices in the *Union Electric* case that the Act was not intended to cover steam plants and therefore should not be read to include hydroelectric plants on nonnavigable waters. *Union Electric Co. v. FPC*, 326 F.2d 535, 550-51 (8th Cir. 1964).

[103] *See, e.g., Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 290 (1946); *SEC v. Sterling Precision Corp.*, 393 F.2d 214, 220 (2d Cir. 1968).

[104] *See* notes 19-20 & 27 *supra* and accompanying text.

[105] *See* note 102 *supra*.

contemplated the licensing of steam plants. Those courts (including this court) that have touched on the question at all appear to have assumed that the Act applied to only hydroelectric facilities.[106] The same can be said
[1229] with respect to commentators,[107] although Willard Gatchell, the former general counsel to the FPC, was of the opinion that § 4(e) could have been read by the Commission to authorize the licensing of steam plants.[108]

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[106] *See, e.g., Montana Power Co. v. FPC*, 298 F.2d 335, 339 (D.C. Cir. 1962); *Pacific Power & Light Co. v. FPC*, 184 F.2d 272, 274 (D.C. Cir. 1950); *Safe Harbor Water Power Corp. v. FPC*, 124 F.2d 800, 806 (3d Cir.), *appeal dismissed*, 313 U.S. 546 (1941); *Clarion River Power Co. v. Smith*, 59 F.2d 861 (D.C. Cir.), *cert. denied*, 287 U.S. 639 (1932); *Appalachian Electric Power Co. v. Smith*, 4 F. Supp. 6, 24 (W.D. Va.), *rev'd on other grounds*, 67 F.2d 451 (4th Cir.), *cert. denied*, 291 U.S. 674 (1933); *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606 (M.D. Ala. 1922).

[107] *See* Kerwin, *supra* note 34, *passim*; LeBoeuf, *An Industry Appraisal of Federal Regulation of Electric Utilities under the Federal Power Act*, 14 Geo. Wash. L. Rev. 174, 190-93 (1945); Pinchot, *supra* note 34, *passim*; Ramey & Murray, *supra* note 13, at 35 & n.47; Schwartz, *Niagara Mohawk v. FPC: Have Private Water Rights Been Destroyed by the Federal Power Act?*, 102 U. Pa. L. Rev. 31, 36 (1953); Shields, *supra* note 54, at 143, 149; Smith, *supra* note 14, at 173; Starr, *supra* note 36, at 180; Tarlock, Tippy & Francis, *supra* note 13, at 514; Comment, *supra* note 13, at 99-100.

[108] Gatchell, *Jurisdictional Problems Under the Federal Water Power Act of 1920*, 14 Geo. Wash. L. Rev. 42, 44 (1945):

> Under this grant of authority, the Commission could issue a license for a steam-electric power plant located on a navigable stream, which utilized the water of such stream for condensing purposes and transmitted the power so generated across, along, or from such stream. Also, a power development utilizing steam rather than

With all respect to Mr. Gatchell, we believe, as shown above, that this overly literal reading of § 4(e) ignores the history and other language of the Act, and it is, of course, at odds with the overwhelming weight of authority.

B.

Similarly, we reject petitioners' contention that technological advances in the 53 years since the Act was passed have wrought such dramatic changes in the operation of steam plants that we should hold that the licensing of such plants by the FPC is consistent with, and indeed essential to, the purpose of the Act.

It is true, as petitioners point out, that recent developments in the technology of thermal-electric power generation have made possible the construction of generating units that dwarf the plants in use as recently as thirteen years ago.[109] An example is the Four Corners plants

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water power as the generating force could well have most of the physical structures listed in Section 3(11) of the statute in the definition of "project." Thus, there is no express limitation of the licensing authority to hydro-electric power plants as distinguished from steam-electric plants. Apparently the legislators considered the title to the Act (". . . to provide . . . for the development of water power . . .") as sufficient to exclude steam-electric plants. The Commission has justified such confidence by never claiming authority to license steam plants, stating in its First Annual Report that it was limited to consideration of projects designed to produce water power."

[109] In 1 FPC, *National Power Survey* 14 (1964), the following table appears.

[Footnote continued on page 49]

involved in this litigation. The tremendous growth in the demand for electricity has resulted in an enormous expansion of the installed thermal-electric capacity [19] and a corresponding increase in the amount of water need for cooling.[20] Giant complexes such as the Four

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[19] [Continued]

Maximum Sizes of Generating Units in the United States

(In megawatts—1 megawatt equals 1,000 kilowatts or 1,000,000 watts)

	Maximum turbine Rating—MW
1900	1.5
1920	60
1930	[1] 208
1940	[1] 208
1950	[1] 208
1956	260
1958	335
1960	450
1963	650
1965	[2] 1,000

[1] Represents a single unit. More typically, maximum prevailing sizes were 75 mw in 1930, 100 mw in 1940, and 175 mw in 1950.

[2] Under construction.

[19] Petitioners point out that in 1920, the total generating capacity of all steam plants in the United States was 8,900 megawatts, Edison Electric Institute, *Historical Statistics of the Electric Utility Industry* 4 (Pub. No. 62-69, 1969); by 1971, total installed capacity of conventional steam plants was 298,315 megawatts, Edison Electric Institute, *Statistical Year Book of the Electric Utility Industry for 1971*, at 6-7 (No. 39, Pub. No. 72-25, Oct. 1972).

[20] The 120 billion gallons a day needed by 1971, *see* note 20 *supra* and accompanying text, is an increase over an esti-

Corners plants will withdraw (often permanently) such large amounts of water[112] that the "power potential" of majority waterways will be affected adversely to an extent greater than that of hydroelectric facilities. Thus, private power interests, petitioners argue, have succeeded in appropriating the power potential in public waters just as their predecessors did in the first part of this century when they built at will upon public lands and in navigable waters. The Supreme Court, it is argued, was not apprised in the *Taum Sauk* case of the extent of water consumption of modern steam plants and the resulting impact on our water resources.

In view of these developments, petitioners argue, FPC licensing jurisdiction should be expanded to effectuate the regulatory scheme envisioned by Congress when it enacted the Federal Water Power Act. The Act was intended to close the regulatory gap[113] created by piecemeal legislation that had served very narrow interests in the comprehensive management of water resources. Accordingly, it must be read to comprehend the regulation of steam plants so that the congressional purpose of promoting orderly development will not be frustrated.

Finally, petitioners argue that an "independent federal agency responsible for regulating a particular industry is given a broad mandate to do all things neces-

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mated 178 million gallons of cooling water needed on a daily basis in 1920. This latter figure is the product of 8,900 megawatts (*see* note 110 *supra*) by 20, which represents the number of gallons per kilowatt per day utilized by inefficient steam plants. *See* Staff of Joint Congressional Comm. on Economics, 91st Cong., 2d Sess., *The Economy, Energy, and the Environment* 99 (Comm. Print 1970).

[112] *See* note 27 *supra* and accompanying text.

[113] *Cf. Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

sary to implement its mandate." [114] This implied "necessary and proper" power encompasses the power of an agency to take account of technological developments that render existing regulatory practices obsolete,[115] and to adjust its operations to govern specific evils not named within its enabling act but clearly anticipated by a flexible statutory command.[116] The Federal Water Power Act, as amended, has given the FPC a "flexible mandate . . . to regulate the interstate electric power industry" and "to institute comprehensive planning for the nation's waterways," [117] and to this end it is necessary that the Commission license and regulate modern-day steam plants, which "threaten to resurrect the evil that regulation was supposed to thwart." [118]

The argument, despite its undeniable appeal, nevertheless, fails. Our natural reluctance to reject explicit language of the Supreme Court—language which, albeit obiter dictum, commanded unanimous agreement of the Justices—is reinforced by several factors. First, of course, the FPC does not have a broad, abstract mandate either to regulate the electric power industry or to engage in comprehensive planning for the utilization of our major waterways. In contrast, the Federal Communications Commission has "broad responsibilities for the orderly development of an appropriate system of local television broadcasting," [119] responsibilities derived from the "uni-

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[114] Petitioners' brief at 12.

[115] *See, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

[116] *See, e.g., American Trucking Ass'n v. United States*, 344 U.S. 298 (1953).

[117] Petitioners' brief at 44, 45.

[118] Petitioners' reply brief at 24.

[119] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).

fied and comprehensive regulatory system for the [broadcasting] industry" established by the Communications Act of 1934, 47 U.S.C. § 151 et seq. (1970).[120] The Federal Water Power Act of 1920 was intended to promote the comprehensive development of the Nation's water resources in the context of regulating hydroelectric power; "the comprehensive development of water power . . . was the central thrust of the Act . . . ."[121] It could not be seriously contended, for example, that § 4(e) of the Act empowered the FPC to license the improvement of a tributary of a navigable river for purposes of navigation or flood control or irrigation in the absence of the development of power from the project.[122] Similarly, although under the holding of the *Taum Sauk* case, the FPC can license hydroelectric plants on nonnavigable waters if the plants transmit their power in interstate commerce, the agency was not authorized to regulate generally the interstate transmission and sale of electricity by nonlicensees until the Act was amended in 1935.[123] The 1920 Act thus did not direct the FPC to

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[120] *Id.* at 168.

[121] *FPC v. Union Electric Co.*, 381 U.S. 90, 101 (1965).

[122] Indeed, the literal language of § 4(e) precludes such a contention. Under that section, the Commission can license project works "necessary or convenient for the development and improvement of navigation *and* for the development, transmission, and utilization of power . . . ." (Emphasis added.)

[123] *See, e.g., United States v. Public Utilities Comm'n of Calif.*, 345 U.S. 295 (1953). It is interesting to observe that in the California PUC case, the Court, in rejecting the argument that the regulatory jurisdiction conferred on the FPC by the 1935 amendments did not include jurisdiction over the transmission of electricity by companies licensed under the 1920 Act, appeared to assume that only hydroelectric projects could be licensed: "not once is [the rate authority granted to the agency by the 1935 amendments] spoken of as one con-

regulate broadly the Nation's electric power industry or its major waterways, and we cannot conclude that recognizing Commission jurisdiction over steam plants is essential to fulfillment of the agency's congressional mandate.

Second, we agree that modern steam plants are of a size and efficiency unknown at the time of the passage of the Federal Water Power Act, that they use correspondingly more water for cooling purposes, and that the earlier plants returned most of their cooling waters to the water source instead of evaporating it. Still most of the electric power produced in this country at the time the Act was passed was generated by water-cooled steam plants.[14] Thus, any legislation intended to regulate comprehensively the interrelationship between the production of power and the efficient management of water resources would surely have taken account of the existence of these water-using steam plants. Congress' failure to do so refutes the argument that the FPC should regard steam plants as an unspecified or unanticipated method of operation whose regulation should now be undertaken as an obvious part of the congressional scheme. Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness.

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ditioned on the electricity concerned having been produced by steam generators or at unlicensed dams." 345 U.S. at 308.

[14] In 1920, of the approximately 50 billion kilowatt hours of electricity generated in the United States, about 70% was produced by steam power. Edison Electric Institute, *Statistical Year Book of the Electric Utility Industry for 1971*, at 17 (No. 39, Pub. No. 72-25, Oct. 1972); 1 FPC, *National Power Survey* 63 (1964). Although petitioners concede that most steam plants in 1920 were water-cooled, instead of air-cooled, they point to the insignificant water use of those plants compared with the use of modern plants. *See* notes 110-11 *supra*.

The limits of this part of petitioners' argument may well have been reached in the *Taum Sauk* case and other
[1232] cases[125] in which it was recognized that the FPC is empowered to license pumped-storage plants, which utilize fossil fuel to pump water into reservoirs and then permit the water to fall to generate power during peak periods. The majority of the Court in the *Taum Sauk* case thought the distinction between steam plants and pumped-storage plants, in terms of the "power potential in water," an "obvious" and "meaningful" one;[126] and, although three justices disagreed, it is interesting to observe that the dissent thought the relevant comparison to be between the pumped-storage plant's utilization of fossil fuel to elevate water for storage purposes and the steam plant's utilization of fossil fuel to heat water for generating purposes.[127] If the "power potential in water" is not involved when water is heated to drive a turbine, there would appear to be less warrant to conclude that it is involved when water is used in the post-generation, cooling process.[128] And there would be no

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[125] *See, e.g., Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied, sub. nom. Consolidated Edison Co v. Scenic Hudson Preservation Conf.*, 384 U.S. 941 (1966). *On remand*, 44 F.P.C. 350 (1970), *aff'd*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

[126] 381 U.S. at 110.

[127] 381 U.S. at 115 (Goldberg, J., dissenting).

[128] We are aware, as petitioners point out, that the use of cooling waters is necessary to increase the efficiency of the generating process:

> This cooling process is a matter not of convenience but of economic necessity. As the steam is exhausted into the condenser and cooled by the water, it condenses to liquid, thus occupying a smaller space than it did formerly and producing a partial vacuum. This vacuum at the exhaust of the turbine permits the entering high-pressure steam to undergo greater expansion, and hence deliver

warrant to conclude that the mere extraction of water, with a consequent decrease in the amount of water available to downstream users for power generation, utilizes the "power potential in water" in a manner impinging on the FPC's licensing jurisdiction.

We are not unsympathetic to petitioners' position. It is somewhat anomalous that the FPC exercises stringent controls over the construction and operation of the great majority of the nation's hydroelectric installations,[129] not operated by federal agencies, but at the same time has no comparable authority with respect to non-hydroelectric installations which in 1971 generated over 80% of the electricity produced in the United States,[130] and utilized large quantities of water in doing so. In this

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more energy to the turbine rotor, than if it expanded only to the pressure of the atmosphere. Roughly, the over-all efficiency of producing useful work from high-pressure steam can be in the 40 to 50 per cent range if the exhaust steam is condensed by use of cooling water, whereas it will be only 30 to 40 per cent if the turbine exhaust is directly to the atmosphere . . . .

P. Cootner & O. Lof, *Water Demand for Steam Electric Generation* 8-9 (1965).

[129] As of 1964, the FPC had licensed about 76% of the conventional, nonfederal hydroelectric capacity of the United States. 1 FPC, *National Power Survey* 101 (1964).

[130] Edison Electric Institute, *Statistical Year Book of the Electric Utility Industry for 1971*, at 2, 18-19 (No. 39, Pub. No. 72-25, Oct. 1972), gives the following figures for 1971:

Total electric power generation (kwh in millions)	1,613,936
Hydro	266,320
Conventional Steam	1,303,465
Nuclear Steam	37,899
Internal Combustion	6,252

age of pervasive federal regulation and of heightened awareness of environmental considerations, it is difficult to comprehend that there should be no federal agency or policy governing the siting and operation of fossil-fueled steam plants. One looks in vain through an array of state and federal legislation for a unified, comprehensive regulatory scheme governing power plant siting.[10] Apart from the Federal Power Act and the Atomic Energy Act, 42 U.S.C. §§ 2011-296 (1970),[11] regulating the construction and operation of hydroelectric plants and nuclear-powered steam plants by the FPC and the Atomic Energy Commission, respectively, federal controls over various aspects of electric power plants are exercised under such diverse legislation as the Rivers and Harbors Act, 33 U.S.C. § 403 (1970), which requires a federal permit to obstruct or modify the course of navigable waters; the Federal Water Pollution Control Act, *as amended*, 33 U.S.C. §§ 1251-376 (Supp. II, 1971-72), which, *inter alia*, provides for the establishment of effluent limitations for navigable waters; the Air Quality Act of 1967, *as amended*, 42 U.S.C. §§ 1857-57*l* (1970), which, *inter alia*, establishes national ambient air quality standards for several pollutants; and provisions requiring federal approval for the leasing of Indian lands for the construction of power plants, 25 U.S.C. § 635 (1970), and for the location of transmission lines and rights of way

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[10] The siting problem is discussed in Journey, *Power Plant Siting—A Road Map of the Problem*, 48 Notre Dame Law. 273 (1972); Ramey & Murray, *supra* note 13; Smith, *supra* note 14; Tarlock, Tippy & Francis, *supra* note 13; Comment, *supra* note 13.

[11] For discussion of the role of the AEC in power plant construction and operation, *see Calvert Cliffs' Coordinating Comm., Inc. v. United States AEC*, 449 F.2d 1109 (D.C. Cir. 1971); Journey, *supra* note 131, at 281; Smith, *supra* note 14, at 172-73; Tarlock, Tippy & Francis, *supra* note 13, at 523-29, 533-39.

across Indian lands, 25 U.S.C. § 323 (1970), national parks, 16 U.S.C. § 5 (1970), or national forests, 16 U.S.C. § 522 (1970).[7] Under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. (1970), the decisions made by federal officers must include consideration of environmental factors and must be accompanied by the completion of certain procedural steps including the filing of environmental impact statements.[8] In addition, there may be federal legislation peculiarly applicable to the operations of particular power plants, such as the extensive regulation of withdrawals of water from the Colorado River system.[9] But there is no comprehensive federal legislation governing the

[7] For discussion of these various statutes and their relationship to power plant siting, see Tarlock, Tippy & Francis, *supra* note 13, at 513-39; Comment, *supra* note 13, at 84-92; Comment, *supra* note 28, at 708-11, 712-15.

[8] *See, e.g., Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1173-76 (6th Cir. 1972); *Calvert Cliffs' Coordinating Comm., Inc. v. United States AEC*, 449 F.2d 1109, 1112-15 (D.C. Cir. 1971); Tarlock, Tippy & Francis, *supra* note 13, at 533-39; Comment, *supra* note 28, at 709-10.

[9] The Colorado River is apportioned between the Upper and Lower Basin states by the Colorado River Compact, *see* 70 Cong. Rec. 324 (1928), and among the states within the basin by the Upper Basin Compact, 63 Stat. 31 (1949), and the Boulder Canyon Project Act, 43 U.S.C. §§ 617-617u (1970). *See Arizona v. California*, 373 U.S. 546 (1963). In times of shortage, the Secretary of the Interior has authority to allocate the waters among the states and among the users of each state. *See Arizona v. California*, *supra*, 373 U.S. at 579-90. Other federal controls over the flow of the river are provided by the Mexican Water Treaty, T.S. 994, 59 Stat. 1219; the Colorado River Storage Project Act, 43 U.S.C. §§ 620-620o (1970); and the Colorado River Basin Project Act, 43 U.S.C. §§ 1501-56 (1970). For a history and discussion of the Colorado River legislation, see H.R. Rep. No. 1312, 90th Cong., 2d Sess. (1968), in 3 U.S. Code Cong. & Ad. News 3666 (1968).

siting or operations of fossil-fueled power plants. Regulation such as it is,[135] is piecemeal and fortuitous. And, federal regulation is complicated by the existence of numerous state commissions having varied responsibilities for plant siting.[137]

It may be, as petitioners argue, that the FPC is the logical agency to design and implement a national siting policy. The Commission has had over 50 years of experience licensing hydroelectric facilities, and since 1935 has engaged in extensive supervision of bulk power suppliers. The Commission is developing an expertise, accelerated by several important judicial decisions,[138] in dealing with environmental problems arising in connection with the construction of power facilities. Indeed, the Commission agrees that it should be the primary

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[135] *See* Comment, *supra* note 28.

[137] For discussion of state regulation of plant siting, see Tarlock, Tippy & Francis, *supra* note 13, at 539-53; Comment, *supra* note 28, at 711-17. A table of state siting laws is contained in Journey, *supra* note 131, app. B.

[138] *See Udall v. FPC*, 387 U.S. 428 (1967); *Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co. v. Scenic Hudson Preservation Conf.*, 384 U.S. 941 (1966), *on remand*, 44 F.P.C. 350 (1970), *aff'd*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); *Pacific Gas & Electric Co.*, 44 F.P.C. 198 (1970); *Arkansas Power & Light Co.*, 40 F.P.C. 522 (1968); *Susquehanna Power Co.*, 32 F.P.C. 826 (1964); *Minnesota Power & Light Co.*, 32 F.P.C. 1407; *PUD No. 1 of Skamania County, Wash.*, 32 F.P.C. 444 (1964); *Puget Sound Power & Light Co.*, 28 F.P.C. 718 (1962); *Citizens Utilities Co.*, 21 F.P.C. 455 (1959); *Namekagon Hydro Co.*, 12 F.P.C. 203 (1953), *aff'd sub. nom. Namekagon Hydro Co. v. FPC*, 216 F.2d 509 (7th Cir. 1954). *See generally* Tarlock, Tippy & Francis, *supra* note 13, at 515-20; Note, *Of Birds, Bees, and the FPC*, 77 Yale L.J. 117 (1967).

certifying agency for plant siting. Its Chairman has advocated such authority [139] on many occasions and the agency has supported several bills introduced in Congress in the past decade providing for federal control over the construction and operation of fossil-fueled power plants and related facilities.[140]

Notwithstanding the foregoing, and quite apart from the practical problems of implementation and administration of the extensive licensing authority that petitioners would have us bestow upon the FPC,[141] adoption of the

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[139] *See* Hearings on H.R. 5277 and Related Bills Before the Subcomm. on Communications of the Senate Comm. on Interstate Commerce, 92d Cong., 1st Sess., pt. 2, at 426-27 (1971) (testimony of FPC Chairman Nassikas); Nassikas, *Coordination of Electric Power and Environmental Policy*, 4 Nat. Res. Law. 268 (1971).

[140] In its 1962 and 1966 annual reports, the Commission recommended that the Federal Power Act be amended to give it licensing jurisdiction over diversion facilities of steam plants. *See 1962 Annual Report of the FPC* 12-13; *1966 Annual Report of the FPC* 8-9. Among the bills introduced in Congress over the past few years that the Commission has favored are H.R. 12585, 91st Cong., 1st Sess. (1969); S. 4121, 91st Cong. 2d Sess. (1970); H.R. 6971, 92d Cong., 1st Sess. (1971); H.R. 5277, 92d Cong., 1st Sess. (1971). For description and analysis of the major siting proposals of recent years, see Journey, *supra* note 131, at 284-302; Ramey & Murray, *supra* note 13, at 38-43; Smith, *supra* note 14, at 182-95; Tarlock, Tippy & Francis, *supra* note 13, at 553-67.

[141] *Cf.* the problems encountered by the FPC in attempting to regulate the sales of natural gas by local producers to interstate pipeline companies after the decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954): the Court later referred to these attempts as "the outstanding examples in the federal government of the breakdown of the administrative process." *Permian Basin Area Rate Cases*, 390 U.S. 747, 758 (1968).

Power plant siting is an extraordinarily complex process requiring the integration of many different factors. *See* au-

position they assert would accomplish by judicial fiat what Congress has refused or neglected to accomplish when it enacted and later amended the Federal Water Power Act. We are restricted to the statute as written by the Congress, illuminated by legislative history, and construed by the Supreme Court. It is not our function either "to rewrite a statute so that it will authorize what [we think] should be authorized"[142] or to "write [1235] into an act of Congress a provision which Congress affirmatively omitted."[143] These canons would be violated if we were to order the FPC to assert jurisdiction over fossil-fueled steam plants. The arguments made by petitioners would be better addressed to the Congress, which has not yet decided to provide explicitly for federal regulation of power plant siting.

III.

In addition to the nonfederal construction and operation of hydroelectric project works, § 4(e) empowers the FPC to issue licenses "for the purpose of utilizing the surplus water or water power from any Government dam . . . ." Petitioners contend that two of the Four Corners plants—Navajo and Kaiparowitz—will withdraw water directly from impoundments created by a Government dam, and that the other four plants are

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thorities cited in note 131 *supra*. FPC Chairman Nassikas has indicated that any effective legislative scheme for plant siting should provide for a transitional period to assure continuity of bulk power supply and the financing of projects already in the planning stages. *See* Hearings on Powerplant Siting and Environmental Protection Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 1st Sess. 26-27 (1971).

[142] *Story v. Snyder*, 184 F.2d 454, 459 (D.C. Cir.), *cert. denied*, 340 U.S. 866 (1950).

[143] *Border Pipe Line Co. v. FPC*, 171 F.2d 149, 152 (D.C. Cir. 1948).

downstream from Government dams and will have water available on a dependable basis only because of the "stream regimen imposed by upstream government dams."[144] According to petitioners, these are usages of "surplus water" that invoke Commission jurisdiction under § 4(e) and require the Commission to regulate the operations of the Four Corners plants. We agree that § 4(e) empowers the FPC to license the use of surplus water by steam plants, and accordingly we remand to the Commission for consideration of petitioners' "surplus water" claim.[145]

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[144] Petitioners' brief at 9.

[145] Although intervenors contend otherwise, the Commission in its brief to us concedes that, with respect to the Navajo and Kaiparowitz plants, petitioners preserved their "surplus water" argument in their application for rehearing as required by § 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b) (1970), as a precondition to our consideration of the claim. Intervenors and respondent assert, however, that neither the complaint nor the rehearing application raised the question of the applicability of the "surplus water" clause to the four plants not withdrawing water directly from Government impoundments, and they contend that we may not consider the claim as it relates to those plants. In the posture of this case, and in view of our resolution of the "surplus water" issue, it makes little difference whether we agree with this contention; petitioners can simply file an amended complaint setting forth the downstream claim, and the FPC will consider it in the first instance just as it will consider the primary "surplus water" claim. Further, we think that intervenors' and respondent's position is not well taken. The policy of § 313(b) of affording an agency the opportunity to consider and determine a question, *see, e.g., FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 499 (1954), was clearly satisfied because Commission rejection (by silence) of the primary "surplus water" claim obviously amounted to a rejection of the secondary claim. And, because petitioners could file an amended complaint raising the secondary claim, the issue would be before us at a future date. Accordingly, the exhaustion requirement of § 313(b) would be inapplicable in this case.

As they do with respect to their broader claim under § 4(e), petitioners rely on the literal language of the Act to support their contention that the FPC is empowered to license the operations of the Four Corners plants. Quite simply, they contend, the plants utilize "surplus water" from Government dams for purposes of generating power.[146] Petitioners accept the following definition of "surplus water" offered by the Commission in a case involving a hydroelectric project downstream from a Government dam:

> Where there is available stored water not to be used in irrigation, which represents storage over and above that needed for irrigation, and which would otherwise flow unused down the main channel of the stream, that water is "surplus water," and, if used for power development, would require a license from this Commission.[147]

Petitioners also point out that under the FPC's own determination, the surplus water need not be withdrawn directly from a Government impoundment in order to trigger FPC licensing jurisdiction:

> It . . . appears immaterial to the Commission's licensing authority under the "surplus water" clause of section 4(e), whether hydroelectric developments utilizing the surplus water from a Government dam are constructed at, or in the immediate vicinity, or several miles downstream from the Government dam. On the other hand, the Commission's licensing authority with respect to hydroelectric development utilizing "water power" from Government dams is limited by natural laws to those developments at or in the vicinity of such dams. The natural laws re-

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[146] Petitioners point out that the use of cooling water is a necessary part of the power generation process. *See* note 128 *supra*.

[147] *California Oregon Power Co.*, 13 F.P.C. 1, 4 (1954), *supplemental opinion*, 15 F.P.C. 14 (1956), *petition dismissed*, 239 F.2d 426 (D.C. Cir. 1956).

> lating to the use of "water power" are such that its utilization may only be at the dam when the power house is integral therewith, or at the downstream end of a pressure conduit leading from the intake to the turbines in the power house. Thus, the "water power" utilized at or in the vicinity of a dam is the result of the head and flow there available.
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> . . . [W]e have found nothing in the language of the act, or in its legislative history, which leads us to believe that the Commission's licensing authority under the "surplus water" clause of section 4(e) is limited to hydroelectric power projects located at or in the immediate vicinity of a Government dam.[18]

Accordingly, petitioners argue, giving the language of the "surplus water" clause its ordinary meaning, reading it disjunctively to the "constructing, operating, and maintaining" clause of § 4(e), and following the Commission's own definitions, all six Four Corners plants are utilizing "surplus water" within the intendment of the Federal Power Act.

Respondent Commission argues that Congress intended the Federal Water Power Act to apply only to water power projects, as indicated by the Act's legislative history, and that steam plants are not "project works" within the Commission's licensing authority. Intervenors contend that the "surplus water" provision applies only to hydroelectric plants utilizing surplus water or water power from Government dams.

We think that the Commission and intervenors construe the "surplus water" clause too narrowly. Initially, it should be observed that the "surplus water" clause does not refer to the licensing of "project works" as does the "constructing, operating, and maintaining" clause. The words "project works" in the latter clause

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[18] *California Oregon Power Co.*, 15 F.P.C. 14, 19 (1956), *petition dismissed*, 239 F.2d 426 (D.C. Cir. 1956).

follow the words "for the purpose of," and they are not found at all in the "surplus water" clause even though that clause is introduced by a second "for the purpose of." By their terms, then, the two licensing provisions of § 4(e) encompass different activities, and it does not follow that the limitation of the reach of the "constructing, operating, and maintaining" clause of hydroelectric projects requires reading a similar limitation into the language of the "surplus water" clause.

Second, unlike the situation with respect to the "constructing, operating, and maintaining" clause, there is little in the way of extrinsic illumination of the congressional purpose in enacting the "surplus water" clause. There is no judicial decision on its scope; the FPC decisions quoted above interpret the clause in the context of proposed hydroelectric developments;[149] and there ap-
[1237] parently is no useful legislative history. What little extrinsic assistance we have been able to piece together, however, tends to show that the language of the "surplus water" clause does indeed mean what it says.

In a line of cases extending back almost thirty years before the passage of the Federal Water Power Act, the Supreme Court confirmed the power of Congress to dispose of the water power inherent in waters over which Congress had jurisdiction, either by generating and selling the power itself or by permitting others to do so.

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[149] The Commission has in the past permitted its licensees to allow waters impounded by their reservoirs to be used for cooling purposes by steam plants, *e.g.*, *Arkansas Power & Light Co.*, 40 F.P.C. 522 (1968); *Duke Power Co.*, 36 F.P.C. 675 (1966), but it has refused in such cases to construe its licensing authority to extend to the operations of the steam plants utilizing the waters, *e.g.*, *Brazos River Authority*, 34 F.P.C. 1507, 1509 (1965). Of course, these decisions involved the "constructing, operating, and maintaining" clause, not the "surplus water" clause.

The basic principle was established in the first *Green Bay* case, *Kaukauna Water Power Company v. Green Bay and Mississippi Canal Company*, 142 U.S. 254 (1891), in which the Court recognized that a state could, consistent with its power to condemn property for a public purpose, reserve for itself for disposition as it saw fit the water power created by the erection of a dam under state auspices for purposes of improving navigation. The Court reasoned that

> if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. . . . As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement.[150]

Seven years later, the Court applied this principle in the second *Green Bay* case, *Green Bay and Mississippi Canal Company v. Patten Paper Company*, 172 U.S. 58 (1898), *rehearing denied*, 173 U.S. 179 (1899), to uphold the right of a grantee of the United States to lease the surplus water power from Government navigation works to other private parties, against a claim by certain riparian owners that they were entitled under state law to an equal apportionment of the water flow and hence of the water power inherent in the river. Describing the case as one involving "water power incidental to the construction and maintenance of a public

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[150] 142 U.S. at 273.

work and, from the nature of the case, subject to the control of the public authorities, in this instance the United States," [151] the Court relied heavily on the first *Green Bay* case to hold that the grantee's right to the water power created by the works was superior to the riparian rights recognized under state law:

> . . . [I]t is . . . plain that the mode and extent of the use and enjoyment of [the water power and appurtenant property] by the Canal Company fall within the sole control of the United States. At what points in the dam and canal the water for power may be withdrawn, and the quantity which can be treated as surplus with due regard to navigation, must be determined by the authority which owns and controls that navigation. In such matters there can be no divided empire.[152]

It was but a short step to the decision in *United States v. Chandler-Dunbar Water Power Company*, 229 U.S. 53 (1913), in which the Court rejected the argument that a federal condemnation of certain riparian property for purposes of improving navigation did not amount to a taking for a public purpose because a section of the condemnation act authorized the Secretary of War to sell the surplus water power after the Government had made the navigation improvements. The Court considered the question largely settled by the decision of the first *Green Bay* case that "[i]f the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the Government." [153] The Government, in a word, could become a water power entrepreneur once it had constructed a dam for a legitimate public purpose.

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[151] 172 U.S. at 76.

[152] 172 U.S. at 80.

[153] 229 U.S. at 73.

However, the "development of our rivers by no means kept pace with the scope of congressional power as defined by the Supreme Court decisions."[154] Congress was slow to appreciate the value of multiple-purpose waterway projects, in particular the tremendous value, from both a pecuniary and a functional standpoint, of the water power within its control. There were a few exceptions. An early act allowed the Secretary of War to lease the water power at a federal arsenal to a private water power company on condition that the company complete the development of the power and maintain it at its own expense.[155] Another early act authorized projects combining irrigation and flood control.[156] In addition, several appropriations bills contained provisions permitting the leasing of the use of the water power of certain navigable waterways, limited to the use of surplus water not required for navigation, with the stipulation that the interests of navigation remain paramount.[157] But, in the Reclamation Act of 1902,[158] under which the Government became involved in the large-scale construction of irrigation works on the public lands in the West, no provision was made for the disposition of water power created by the reclamation dams.

During Theodore Roosevelt's administration, however, a number of significant developments occurred. In 1906, the Reclamation Act was amended to allow the Secretary of the Interior to lease surplus water power:

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[154] Fly, *supra* note 34, at 279.

[155] Act of March 3, 1879, ch. 182, 20 Stat. 377, 387.

[156] 25 Stat. 505, 526 (1888); *see* Fly, *supra* note 34, at 287.

[157] Act of August 11, 1888; ch. 860, 25 Stat. 400, 417; Act of September 19, 1890, ch. 907, 26 Stat. 426, 447; Act of June 28, 1902, ch. 1299, 32 Stat. 408, 409.

[158] 32 Stat. 388, *as amended*, 43 U.S.C. §§ 371 et seq. (1970).

> Whenever a development of power is necessary for the irrigation of lands . . . or an opportunity is afforded for the development of power under any [reclamation] project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege . . . . *Provided*, That no lease shall be made of such surplus power or power privileges as will impair the efficiency of the irrigation project . . . .'[179]

After this amendment, the Government became involved in the business of generating hydroelectric power, primarily because of the works constructed for pumping purposes at reclamation projects,[180] and the principle of sale of surplus water power was introduced to Government projects bearing no necessary relation to navigation. President Roosevelt, in his several vetoes of power site bills and his appointments of commissions such as the Inland Waterways Commission,[181] made clear that the development of water power should be used by the Government to defray the cost of waterway improvement, and that efficient water resource management required the integration of many water uses in single projects.[182] Condemnation acts such as that involved in the *Chandler-Dunbar* case, *supra*, began to incorporate provisions authorizing the Government to develop water power for its own use or lease at Government projects intended primarily to accomplish other purposes.

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[179] Act of April 16, 1906, ch. 1631, § 5, 34 Stat. 117, *as amended*, 43 U.S.C. § 522 (1970).

[180] *See Burley Irrigation Dist. v. Ickes*, 116 F.2d 529, 530-32 (D.C. Cir. 1940), *cert. denied*, 312 U.S. 687 (1941); 1 FPC, *National Power Survey* 100 (1964).

[181] *See* note 19 *supra*.

[182] *See* Fly, *supra* note 34, at 290.

In the second decade of this century, the soundness of President Roosevelt's position on water resource development became increasingly recognized. Legislative developments included the 1910 amendment to the General Dam Act,[163] and another amendment to the Reclamation Act, which provided that surplus storage and carrying capacity developed in a particular reclamation project could be utilized on a contractual basis by other distributors of irrigation waters.[164] A Senate subcommittee report issued in 1912 declared:

> If, for the purpose of improving the navigability of a stream carrying interstate commerce, the Federal Government constructs and maintains a dam, with locks and gates, the Government has the undoubted right to establish and maintain, in connection with such dam, an electric-power plant for the purpose of furnishing motive power to operate such locks and gates. And the Federal Government has the right to sell, lease, or rent, for compensation, any surplus power that may arise from and be an incident to such an improvement of navigation.[165]

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[163] *See* note 49 *supra* and accompanying text.

[164] Act of February 21, 1911, ch. 141, 36 Stat. 925, codified in 43 U.S.C. §§ 523-25 (1970).

[165] 48 Cong. Rec. 11,568, 11,571 (1912), subsequently published as Sen. Doc. No. 246, 64th Cong., 1st Sess. 17 (1916), quoted in Fly, *supra* note 34, at 290. One year after the decision in *United States v. Chandler-Dunbar Water Power Company*, 229 U.S. 53 (1913), the Adamson Bill, H.R. 16053, 63d Cong., 2d Sess. (1914), was introduced in Congress as the first of the bills leading to the enactment of the Federal Water Power Act. It contained a provision authorizing the leasing of surplus power developed by Government water power plants. *See* Kerwin, *supra* note 34, at 176. In 1916, Senator Newlands attempted to amend the Shields Bill to provide an appropriation for developing multiple-purpose waterway projects and formulating plans for comprehensive development of the major river system. *See* 53 Cong. Rec. 3733-36 (1916); Fly, *supra* note 34, at 292; Kerwin, *supra* note 34, at 205-16.

In 1917, a rivers and harbors appropriation act created a Waterways Commission to coordinate the various bureaus and commissions of the United States with responsibility for water resources, to investigate questions relating to the improvement and control of navigation with respect to all watersheds in the United States, and to include

> therein the related questions of irrigation, drainage, forestry, arid and swamp land reclamation, clarification of streams, regulation of flow, control of floods, utilization of water power, prevention of soil erosion and waste, storage, and conservation of water for agricultural, industrial, municipal, and domestic uses, cooperation of railways and waterways, and promotion of terminal and transfer facilities, to secure the necessary data, and to formulate and report to Congress, as early as practicable, a comprehensive plan or plans for the development of waterways and the water resources of the United States for the purpose of navigation and for every useful purpose.[166]

The Act of 1917 was explicitly repealed by the Act of 1920,[167] and the newly created Federal Power Commission took over the planning and coordination responsibilities of the Waterways Commission,[168] which included [1240] consideration of a spectrum of water uses not related to water power.

The Federal Water Power Act of 1920 thus represents the culmination of many different pressures. Technological advances made it imperative that huge water-

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[166] Act of August 8, 1917, ch. 49, 40 Stat. 250, 269. *See* Starr, *supra* note 36, at 180; Walker & Cox, *Jurisdiction of the Federal Power Commission over Non-Power Water Uses*, 5 Land & Water L. Rev. 65, 73-74 (1970).

[167] Act of June 10, 1920, ch. 285, § 29, 41 Stat. 1077.

[168] *See, e.g.*, 16 U.S.C. § 797(a) (1970).

works be designed to perform several functions."[30] The federal government was becoming more involved in the construction of major water projects, and American entry into World War I precipitated projects such as the provision of water power for the munitions complex built during World War I on the Tennessee River near Muscle Shoals, Alabama.[31] The water resources, including the inherent water power, controlled by the Government were increasingly seen as a valuable asset to be exploited in a way that would benefit the public by insuring the self-sufficiency of projects and maximum use of public resources.

Accordingly, the Federal Water Power Act undertook to regulate the nonfederal exploitation of the nation's water power resources and the disposition of excess federally controlled water or water power. Section 4(e) assures maximum utilization of water resources for navigation, water power, and other beneficial uses by providing for the licensing, in accordance with § 10(a), 16 U.S.C. § 803(a)[32] of nonfederal construction and operation of water power projects on navigable waters, public

[30] *See* Fly, *supra* note 34, at 287-88.

[31] *See Ashwander v. TVA*, 297 U.S. 288 (1936).

[32] 16 U.S.C. § 803(a) (1970) provides:

> All licenses issued under sections 792, 793, 795-818, and 820-823 of this title shall be on the following conditions:
>
> (a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

lands, or reservations, and for the licensing of the nonfederal use either of water impounded by a Government dam in excess of the amount needed to accomplish the purpose of the dam or of actual hydroelectricity generated by a Government dam and not required for governmental purposes.

We are persuaded that the "surplus water" provision was intended to serve broader interests than the "constructing, operating, and maintaining" clause, which was intended only to regulate nonfederal hydroelectric projects. It reflects an explicit concern with utilizing water resources to defray the cost of waterway improvements as well as a concern with comprehensive water resource management. It empowers the FPC to license the use of either "surplus water" or "water power" from *any* Government dam, and thus is not limited to the mere leasing of excess Government water power. It is interesting to observe that three months before the Act was finally passed, Congress amended the Reclamation Act to authorize the Secretary of Interior "to enter into contract to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper . . . ."[1] Since Congress was obviously concerned with maximizing the public benefit from Government waterworks, the inference arises that the addition of the words "surplus water" in § 4(d) of the Federal Water Power Act was intended to afford the FPC a broad licensing authority over federally controlled waters comparable to that afforded the Secretary of Interior in reclamation projects. The FPC could license either the use of "water power" —*i.e.*, electricity actually generated by the Government —or the use of "surplus water" for the private generation of water power or other purposes. This would obvi-

[1] Act of February 25, 1920, ch. 86, 41 Stat. 451, codified in 43 U.S.C. § 521 (1970).

ate the previous necessity of providing in specific acts relating to specific projects, that surplus water could be leased for power purposes and would also take account of the expanding governmental involvement in water resource use and development.

This interpretation, which gives effect to the literal language of § 4(e), is strengthened, somewhat paradoxically, by developments subsequent to the passage of the Federal Water Power Act that diluted Commission authority. In 1928, Congress passed the Boulder Canyon Project Act, 43 U.S.C. §§ 617-17u (1970), which authorized the first federal large-scale multiple-purpose project on a major waterway. The Act authorized the construction of what ultimately became Hoover Dam and other works, for purposes of flood control, navigation, and reclamation, and for generating electricity to make the project self-sufficient financially.[173] The Secretary of the Interior was empowered to contract for the storage and delivery of water "for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which . . . will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under" the Act.[174] Under 43 U.S.C. § 617e. the Secretary of the Interior is authorized to lease units of any Government power plant of the project, with the right to generate electricity, and to lease "the use of water for the generation of electrical energy," in conformity with the requirements of the Federal Power Act and the rules and regulations of the Federal Power Commission. These provisions, although

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[173] *See* 43 U.S.C. §§ 617, 617e (1970).

[174] 43 U.S.C. § 617d (1970).

seemingly ousting the FPC of direct authority over the surplus water and water power of what would be a "Government dam" under the Federal Power Act, indicate the breadth of congressional concern with federal management of federal property to promote efficient water resource utilization. In 1933, the Tennessee Valley Authority was created to undertake duties in the Tennessee River basin comparable to those of the Secretary of Interior under the Boulder Canyon Project Act.[173] Under 16 U.S.C. § 831i, the T.V.A. is given the authority to sell the surplus power generated by it and not needed in its own operations.[174] Under the 1936 and 1944 Flood Control Acts, the Department of the Army is empowered to build and control dams and other improvements for purposes of flood control and navigation. 33 U.S.C. §§ 701 et seq. (1970). The Secretary of the Army is empowered to contract with states, municipalities, private concerns, and individuals "for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army . . . ."[175]

Acts such as these obviously cut into FPC authority to regulate the utilization of surplus water or power, and it is apparent that in every case involving a contention of the applicability of the "surplus water" clause, the FPC will have to consider the interrelationship of its enabling act and the scope of the authority of the Government agency responsible for the particular Government dam.[176] But it is also apparent that Congress has for a long time been concerned with the controlled dis-

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[173] Act of May 18, 1933, ch. 32, 48 Stat. 58, *as amended*, 16 U.S.C. §§ 831-31dd (1970).

[174] *See Ashwander v. TVA*, 297 U.S. 288 (1936).

[175] 33 U.S.C. § 708.

[176] *Cf. United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953).

position of surplus federal water and power, and has often expressed this concern by granting plenary control over such disposition to a federal agency. We believe the "surplus water" provision of the Federal Power Act to be but an early manifestation of that concern. At a minimum, Congress surely intended to give the FPC control over the use of surplus waters for the generation of power, no matter by what mechanical force the electricity is ultimately produced.[179]

Accordingly, we hold that the Commission erred in dismissing petitioners' complaint, and we remand to the Commission to consider the surplus water claim. We do not decide whether the FPC does have jurisdiction over the four plants alleged to be the beneficiaries of Government surplus water by virtue of their being downstream from Government dams because we have no record on which to base such a determination.[180] We hold only that the Commission does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants, and we leave to the Commission to determine in the first instance whether the plants involved in this appeal fall within the category asserted by petitioners. In determining this question, the Commission should also consider whether any jurisdiction it might have under the Federal Power Act is affected in any way by the jurisdiction of any other federal agency.

Remanded to the Federal Power Commission for further proceedings not inconsistent with this opinion.

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[179] It has been argued that the "surplus water" clause empowers the FPC to license nonpower uses of surplus federally controlled water. *See* Walker & Cox, *supra* note 166, at 70-75.

[180] *Cf. California Oregon Power Co. v. FPC*, 239 F.2d 426, 432 (D.C. Cir. 1956).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1973

No. 71-2012

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

ARIZONA PUBLIC SERVICE COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, UTAH POWER & LIGHT COMPANY, DEPARTMENT OF WATER AND POWER OF THE CITY OF L.A., EL PASO ELECTRIC COMPANY, NEVADA POWER COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, TUCSON GAS & ELECTRIC COMPANY, *Intervenors*

Before: WRIGHT and TAMM, Circuit Judges; and McCREE*, United States Circuit Judge for the Sixth Circuit.

Order

On consideration of Intervenors' Arizona Public Service Company, El Paso Electric Company, Nevada Power Company, Salt River Project Agricultural Improvement and Power District, San Diego Gas & Electric Company, Southern California Edison Company, Tucson Gas & Electric Company, and Utah Power & Light Company, petition for rehearing, it is

ORDERED by the Court that Intervenors' aforesaid petition for rehearing is denied.

PER CURIAM

FOR THE COURT:
/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

* Sitting by designation pursuant to Title 28, U.S.C. § 291(a).

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Before: WRIGHT and TAMM, Circuit Judges; and McCREE*, United States Circuit Judge for the Sixth Circuit.

Order

On consideration of the Petition for Rehearing, or in the alternative a suggestion for reconsideration *en banc* of the Department of Water and Power of the City of Los Angeles, Intervenor, it is

ORDERED by the Court that Intervenor's aforesaid petition is denied.

PER CURIAM
FOR THE COURT:
/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

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* Sitting by designation pursuant to Title 28, U.S.C. § 291(a).

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; John A. Carver, Jr., Albert B. Brooke, Jr., and Pinkney Walker.

Docket No. E-7664

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.

v.

ARIZONA PUBLIC SERVICE COMPANY, ET AL.

ORDER DISMISSING COMPLAINT

(Issued November 4, 1971)

On September 10, 1971, The Chemehuevi Tribe of Indians, the Cocopah Tribe of Indians, the Sierra Club, the Committee to Save Black Mesa, Inc., Emma Yazzie, Jimmy Yazzie, Paul Begay, Chester Hugh Benally, and Bill Begay (complainants) filed a complaint and petition for order to show cause pursuant to 18 C.F.R. § 1.6, requesting the Commission to determine a " . . . single legal issue: does the Federal Power Commission have licensing jurisdiction over steam plants generating and transmitting energy in interstate commerce, which withdraw large quantities of water from navigable streams for cooling and other plant purposes?" (complaint, para. 19). The complaint seeks to invoke licensing jurisdiction of this Commission granted pursuant to Part I of the Federal Power Act, 16 U.S.C. 792-823 (complaint, paras. 7-9).

The Commission may, at any stage of a proceeding, make a determination of its jurisdiction and may do so on its own motion as well as upon request of the parties. All of the parties cited as "complainees" by complainants have not responded to the complaint.[1] The issue of jurisdiction

[1] The Secretary, by notice dated October 19, 1971, extended the time within which to respond to the complaint,, to on or before November 9, 1971. The cited respondents include Arizona Public Service Company, Southern California Edison Company, Public

is clear and warrants disposition of this matter upon the complainants' pleadings without the necessity of further answers or briefing. The complaint must be dismissed.

The authority of this Commission to license facilities under Part I of the Federal Power Act is that of licensing project works. *Lake Ontario Land Development & Beach Protection Ass'n* v. *Federal Power Commission*, 212 F.2d 227, 232 (CADC, 1954), *cert. denied*, 347 U.S. 1015 (1954). They are defined in the Act, 16 U.S.C. § 796(12), as the physical structures of a project. Project is defined as follows, 16 U.S.C. § 796(11):

> "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system, or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

The thermal electric generating stations referred to in the complaint,[2] are not properly classifiable as project works within the meaning of Part I of the Federal Power Act, which was originally enacted as the Federal Water Power Act, approved June 10, 1920 (41 Stat. 1063). By Title II of the Public Utility Act of 1935 (49 Stat. 838), the original Federal Water Power Act, with certain clari-

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Service Company of New Mexico, Salt River Project, Tucson Gas and Electric Company, El Paso Electric Company, Los Angeles Department of Water & Power, Nevada Power Company, Utah Power & Light Company, and San Diego Gas & Electric Company.

[2] Four Corners plant, Mohave plant, Navajo plant, San Juan plant, Huntington Canyon plant, and Kaiparowits plant.

fying amendments, was made Part I of the Federal Power Act. The preamble of the Federal Water Power Act (41 Stat. 1063), specifies that one of the purposes of that legislation was to provide for the development of water power. Steam power is not mentioned. Moreover, the legislative history shows that it was not intended that the licensing of thermal stations be included.

This construction of the Commission's licensing jurisdiction under Part I of the Federal Power Act has been the long-standing interpretation of the Commission. See First Annual Report of the Federal Power Commission, pp. 51-52 (1921); Forty-Fourth Annual Report of the Federal Power Commission, pp. 10-11 (1964); and Forty-Fifth Annual Report of the Federal Power Commission, p. 159 (1965). It has been recognized favorably by the Supreme Court. See *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, 110 (1965).

The Commission further finds:

The Commission is without jurisdiction to grant the substantive licensing relief requested by complainants in their complaint and petition.

The Commission orders:

Complainants' complaint and petition, filed September 10, 1971, is dismissed for lack of Commission jurisdiction.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; John A. Carver, Jr., Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

Docket No. E-7664

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.

v.

ARIZONA PUBLIC SERVICE COMPANY, ET AL.

ORDER DENYING APPLICATION FOR REHEARING

(Issued December 10, 1971)

On November 12, 1971, application for rehearing of an order dismissing complaint issued November 4, 1971, was filed by the Chemehuevi Tribe of Indians, the Cocopah Tribe of Indians, the Sierra Club, the Committee to Save Black Mesa, Inc., Emma Yazzie, Jimmy Yazzie, Paul Begay, Chester Hugh Benally, and Bill Begay (Complainants).

The respondents are Arizona Public Service Company, Southern California Edison Company, Public Service Company of New Mexico, Salt River Project, Tucson Gas and Electric Company, El Paso Electric Company, Los Angeles Department of Water & Power, Nevada Power Company, Utah Power & Light Company, and San Diego Gas and Electric Company.

The Commission finds:

The application for rehearing filed by Complainants presents no new facts or principles of law which were not fully considered by the Commission in its order of November 4, 1971, or which, having now been considered warrant any modification of that order.

The Commission orders:

The application for rehearing filed by Complainants on November 12, 1971, is denied.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.

Description of Power Plants, Federal Water Contracts, and Legislation Authorizing Such Contracts

1. *The Mohave Plant* is located on patented land in Clark County, Nevada.[1] It consists of two 750,000 kilowatt coal-fired steam generating units with related facilities and equipment.

The decree of the Supreme Court in *Arizona* v. *California*, 376 U.S. 340 (1964), allocated the consumptive use of 300,000 acre-feet annually to the State of Nevada (Art. II(B)(1)).The Secretary of the Interior, on October 26, 1966, entered into a contract for a 30-year term with the Colorado River Commission of Nevada (No. 14-06-300-1876) under the authority of the Boulder Canyon Project Act (43 U.S.C. § 617-617v) to store and deliver 30,000 acre-feet annually for use in the Mohave Plant. The plant uses water from the main stream of the Colorado River, below Davis Dam. The United States agreed therein to build the diversion works at Nevada's expense. The contract states a storage charge of 50 cents per acre-foot.[2]

On the same date the Commission entered into a Water Contract, (No. 14-06-300-1877) on which the Secretary's endorsement of approval is signed, for re-delivery of that quantity to Southern California Edison Company on the same terms, plus a surcharge to the Commission. That company, in turn, has assigned undivided interests therein to the co-owners of the Mohave Plant. The Secretary's contract with Nevada, and Nevada's contract with the com-

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[1] This site is approximately 375 miles west of the Four Corners Plant, New Mexico, and 255 miles southwest of the Navajo Plant at Lake Powell, Arizona.

[2] Proceeds are required by the Boulder Canyon Project Act and the Boulder Canyon Project Adjustment Act to be deposited in the Treasury in the Colorado River Dam Fund. The Colorado River Basin Project Act reallocated receipts to other funds, for specific purposes. 43 U.S.C. § 1543.

panies, contain detailed environmental protection provisions. Due to the advanced stage of design and construction of this plant, an Environmental Impact Statement was not required under the National Environmental Policy Act, 42 U.S.C. § 4321. *Jicarilla Apache Tribe of Indians, et al.* v. *Morton, et al.*, 3 E.R.C. 1919 (D. Ariz. 1972), *aff'd*, 471 F.2d 1275 (9th Cir. 1973).

2. *The Navajo Plant* is located on the Navajo Indian Reservation near Page, Arizona.[3] It consists of three coal-fired steam electric generating units each having an estimated net capability of 770,000 kilowatts and all related facilities and equipment. The United States owns a 24.3% interest in it. This plant is being constructed upon land under lease from the Navajo Tribe of Indians, approved by the Secretary of the Interior. On December 10, 1969, the Department of the Interior executed a grant of rights-of-way and easements for use in connection with the plant.

Water is supplied to the plant by the Secretary of the Interior from Lake Powell, the reservoir impounded by the Glen Canyon Dam, under a contract dated January 17, 1969 (No. 14-06-400-5033), with the participants made pursuant to the Colorado River Storage Project Act (43 U.S.C. § 620-620(o)), the Reclamation Project Act of 1939 (43 U.S.C. § 485-485k), and the Colorado River Basin Project Act (43 U.S.C. § 1501-56). The last-named statute (43 U.S.C. § 1523) directed the Secretary to submit to Congress a plan for acquisition of an interest in a thermal plant as a source of power for pumping water into and in the Central Arizona Aqueduct. He submitted the required plan. It proposed acquisition of an interest (later specified as 24.3% of capacity). Congress approved the plan and has appropriated $149.5 million (through F.Y. 1974) in payment of the federal share (estimated at $200,000,000) of the

[3] This site is approximately 137 miles west of the Four Corners Plant, New Mexico, and 255 miles northeast of the Mohave Plant, Nevada.

cost of the plant. The charge for water is $7.00 per acre-foot. Proceeds are required by the Colorado River Storage Project Act to be deposited in the Upper Colorado River Fund for assistance to projects identified in that act. In confirmation, the co-owners of the Navajo Plant (including the United States) were awarded 34,100 acre-feet of water for consumptive use by Arizona Water Permit No. A 3224 on September 4, 1969, issued by the Arizona State Land Commissioner, out of the 50,000 acre-feet of water allocated to Arizona in the Upper Colorado River Basin Compact. This action was authorized by an act of the Arizona State Legislature, A.R.S. § 45-155, adopted April 9, 1969.

On November 20, 1969, the United States entered into a "participation agreement" with the other owners of the Navajo Plant, confirming a federal beneficial interest of 24.3%. By instrument dated December 22, 1969, Salt River Project transferred undivided interests in the Water Service Contract and Arizona Water Permit to the co-owners of the Navajo Plant. On January 16, 1970, the United States entered into a supplemental contract with its co-owners, agreeing to take all necessary action within the power of the Department of the Interior "to prevent total depletions chargeable to the State of Arizona under the Upper Colorado River Basin Compact resulting from consumptive use of water from the Upper Colorado River System in the State of Arizona as measured at Lee Ferry in the manner provided for in Article VI of the Upper Colorado River Basin Compact from exceeding the 50,000 acre-feet apportioned to the State of Arizona by the Upper Colorado River Basin Compact." By an Indenture of Lease from the Navajo Tribe of Indians to the Navajo Plant co-owners, the Navajo Tribe agreed not to make any use of the 50,000 acre-feet of water allotted to Arizona's use of the Upper Basin waters which would diminish the availability of the 34,100 acre-feet.

All contracts executed or approved by the Secretary contain environmental protection safeguards established by the Secretary. The final Environmental Impact Statement, in compliance with 42 U.S.C. § 4332(2)(C) *et seq.*, was filed with the Council on Environmental Quality on February 4, 1972, and approved in the *Jicarilla* case, *supra*.

3. *The proposed Kaiparowits Plant*, still in the planning stage, would be a coal-fired generating station to be located upon patented land in southern Utah[4] near Lake Powell with a planned generating capacity of 3,000 megawatts. At present the Kaiparowits project consists of interests in coal mineral leases on state and federal land on the Kaiparowits Plateau in Kane County, Utah, water appropriation and water service rights under the laws of Utah, a federal water delivery contract *infra*, and applications for rights-of-way on federal land.

Water for use at the Kaiparowits Plant would be made available by the United States from Lake Powell pursuant to Water Service Contract No. 14-06-400-5139, dated October 2, 1969, between the United States Bureau of Reclamation, Department of the Interior, and the owners, up to a maximum of 102,000 acre-feet per year. The charge is $7.00 per acre-foot. Proceeds per the Colorado River Storage Project Act, must be deposited in the Upper Colorado River Fund in aid of projects referred to therein.

An Environmental Impact Statement in compliance with 42 U.S.C. § 4332(2)(C), *et seq.*, will be required to be prepared by the Department of the Interior in connection with the grant of necessary rights-of-way if these plants are to be constructed.

4. *The Huntington Plant* is located primarily on state and patented land in Huntington Canyon, Utah, approxi-

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[4] Two sites are under consideration, approximately 30 and 35 miles northwest of the Navajo Plant site and 170 miles west northwest of the Four Corners site.

mately 29 miles from Price, Utah.[5] The first unit of 430,000 kilowatts has been completed. Present plans are for at least two coal-fired units each with a capacity of about 430,000 kilowatts.

Water in sufficient quantity for use of the two units at the Huntington Plant is obtained from Huntington Creek. Rights to such water have been obtained by purchase of stock from private water companies, appropriators under the laws of Utah.

In addition, the owner of the Huntington Plant (Utah Power & Light Company) entered into a contract November 17, 1972, with the Secretary of the Interior and Emery Water Conservancy District under the Reclamation Project Act of 1939, pursuant to which the District will supply 6,000 acre-feet annually from Joe's Valley Reservoir on Huntington Creek for use by Utah Power and Light Company at the Huntington Plant or at a planned unit in another location. The charge (which the company is now paying, although it is not using such water) is $20.00 per acre-foot. The contract contains environmental controls prescribed by the Secretary.

An Environmental Impact Statement was filed in compliance with 43 U.S.C. § 4332(2)(C), *et seq.*, and approved in the *Jicarilla* case, *supra*.

5. *The San Juan Plant* is located upon patented land near Farmington, New Mexico.[6] It will consist of three or four coal-fired steam generating units, the first two units of 330,000 kilowatts nominal rating. The first unit commenced operation on November 30, 1973.

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[5] This site is about 250 miles northwest of the Four Corners Plant and 170 miles north of the Navajo Plant.

[6] This site is about 9 miles northeast of the Four Corners Plant.

Pursuant to specific authorization by the Act of March 22,1968, P.L. 90-272, the Secretary of the Interior contracted with Public Service Company of New Mexico, co-owner, the Project Manager and Operating Agent of the Project, to deliver from storage in Navajo Reservoir on San Juan River 20,200 acre-feet of water per year pursuant to Water Service Contract No. 14-06-400-4821, at a charge of $7.00 per acre-foot. The Secretary is required by the Colorado River Storage Project Act to deposit these proceeds in the Upper Colorado River Fund. Public Service Company of New Mexico has by contract agreed to assign, subject to certain conditions, an undivided one-half interest in the Water Service Contract to Tucson Gas and Electric Company, the other co-owner of the San Juan Plant, or to make water allotted by the contract available to the Plant. The State of New Mexico has approved the foregoing allocations of wat r and issued permits for its use.

The Water Service Contract contains environmental protection provisions. The final Environmental Impact Statement in compliance with 42 U.S.C. § 4332 (2) (C), *et seq.*, was filed with the Council on Environmental Quality on March 1, 1973.

6. *The Four Corners Plant* is on the Navajo Indian Reservation near Farmington, New Mexico. It consists of five coal-fired steam electric generating units, located on land leased from the Navajo Tribe and supplied by coal from the Navajo Reservation, under contracts approved by the Secretary of the Interior. Units 1 and 2 each have a nominal rating of 175,000 kilowatts. Unit 3 has a nominal rating of 225,000 kilowatts. Units 4 and 5 each have a nominal rating of 755,000 kilowatts. All are in operation.

Water is obtained from the natural flow of the San Juan River under a permit issued by the State Engineer, for diversion and consumptive use of water up to 51,000 acre-

feet annually. These rights are recognized by the United States as senior to rights to water stored in the Navajo Reservoir, and water is passed through the reservoir to satisfy them.

The coal and site lease agreements of the Navajo Tribe, approved by the Secretary, all contain environmental protection provisions. Due to the substantial completion of this plant on January 1, 1970, an Environmental Impact Statement was not required under the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq. Jicarilla Apache Tribe of Indians, et al.* v. *Morton, et al.*, 3 E.R.C. 1919 (1972), *aff'd*, 471 F.2d 1275 (9th Cir. 1973).

Supreme Court, U. S.
FILED
MAY 22 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1666

ARIZONA PUBLIC SERVICE COMPANY, ET AL.

v.

CHEMEHUEVI TRIBE, ET AL.

No. 73-1667

FEDERAL POWER COMMISSION

v.

CHEMEHUEVI TRIBE, ET AL.

Brief of
The American Public Power Association
Amicus Curiae

In Support of
Petitions for Certiorari

FRANK WILLIAM FRISK, JR.
Attorney for
American Public Power
Association
Suite 212
2600 Virginia Ave. N.W.
Washington, D.C. 20037

May 22, 1974

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IN THE

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OCTOBER TERM, 1973

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ARIZONA PUBLIC SERVICE COMPANY, ET AL.

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No. 73-1667

FEDERAL POWER COMMISSION

v.

CHEMEHUEVI TRIBE, ET AL.

BRIEF OF AMERICAN PUBLIC POWER ASSOCIATION, AMICUS CURIAE

The American Public Power Association supports the petition of the Solicitor General, on behalf of the Federal Power Commission (*FPC* v. *Chemehuevi Tribe of Indians, et al.*, No. 73-1667), and that of the Utilities (*Arizona Public Service Co., et al.* v. *Chemehuevi Tribe of Indians, et al.*, No. 73-1666), for certiorari to the Court of Appeals for the District of Columbia Circuit, to review the judgment of that court in *Chemehuevi Tribe of Indians, et al.* v. *Federal Power Commission, et al.*, 489 F.2d 1207 (D.C. Cir. 1973).

APPA has received the consent of counsel for all parties to file this brief *amicus curiae*, in accordance with Rule 42 of this Court.

INTEREST OF THE AMICUS CURIAE

The American Public Power Association is composed of some 1,400 consumer-owned electric utilities in 48 States, Puerto Rico, American Samoa, the Virgin Islands and Guam. The members are municipalities, State power authorities, districts, cooperatives, and other public agencies.

The number of fossil-fuel power plants owned by publicly owned electric utilities reported to the Federal Power Commission in 1971 was 363, which constituted a total installed capacity of 21,108,410 kilowatts.[1] It is reasonable to expect that the installed capacity of such consumer-owned steam plants will quadruple by 1990.[2] In addition, a number of consumer-owned utilities have under construction, or are planning, nuclear generating plants. Publicly owned utilities also purchase electric power at wholesale from other utilities which are building or planning such nuclear facilities. All fossil-fuel generating plants use water in their boilers, and they, as well as nuclear plants, use water in their cooling operations. In many cases, such water is taken from "navigable waters" as defined in Section 3 of the Federal Power Act, 16 U.S.C. § 796(8). In others, water is taken from reaches of streams where the regimen is affected by

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[1] FPC, Statistics of Publicly Owned Electric Utilities—1971, Table 7, at XIV (1972).

[2] FPC, The 1970 National Power Survey, Table 1.2, at I-1-17 (1971).

the existence of government dams upsteam. The latter is deemed by the court below "surplus water" from a government dam, the use of which requires a license pursuant to Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e). We believe that conclusion to be in error, and to be seriously prejudicial to the interests of our member utilities, for the reasons stated below. We therefore support the petition for certiorari of the Commission and the Utilities which seek a review of that determination.

ARGUMENT

We shall not repeat the arguments of the Solicitor General and the petitioning Utilities. We agree with them. We believe, however, that it is appropriate that the Court be informed of the particular stake that publicly owned utilities have in the early review by the Supreme Court of the lower court's decision.

1. The decision has already created great confusion in the planning of thermal plants by consumer-owned utilities, at a time when the industry is hard-pressed to meet its load responsibilities. There is nothing interlocutory about the decision in its effect on our members outside the Colorado River Basin. The decision, *Chemehuevi Tribe of Indians, et al.* v. *FPC, et al.*, 489 F.2d 1207 (D.C. Cir. 1973), is explicit and final in its holding that:

> ". . . the Commission does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants . . .", *(Id.* at 1242*)*.

leaving to the Commission the problem of deciding what constitutes surplus water in all cases, not just this one, and to decide to what extent its jurisdiction has been affected by congressional grants of authority

to other agencies. These issues invite litigation and delay in respects noted briefly below.

2. Serious long-range stretch-outs would be imposed upon the financing and construction of steam electric generating plants, if the decision below were to remain the law in the District of Columbia Circuit, controlling the Federal Power Commission until changed by the Supreme Court in some other case at some uncertain future date. These delays would be of several kinds. Thus:

A. Publicly owned power plants are financed, in most cases, by the issuance of revenue bonds. Where the bond issue relates to a particular thermal generating plant, the bonds cannot be sold unless and until the attorney for the public agency certifies that all necessary permits and licenses for that plant have been obtained. Bond counsel require such a certificate, and verify its accuracy. If the decision of the court below remains in force, it will be impossible to issue such a certificate with respect to any thermal power plant proposed to be located below a government dam in a reach where the regimen of the stream is affected by that dam, unless and until a proceeding of some sort in the Federal Power Commission has resulted either in the issuance of a license, or in a determination that no license is required.

B. Proceedings in the Commission which result in a decision that no license is required, assuming that such a proceeding is available in a "surplus water" case under Section 23 of the Federal Power Act, 16 U.S.C. § 816[3] (and this is not clear), would be subject to ap-

[3] FPC v. Union Electric Co., 381 U.S. 90 (1965), cited extensively below and in the petitions here, arose under Section 23.

peal by the project's opponents. A delay of at least a year in the Commission, and another one to two years in the court of appeals, could be anticipated. Such delays, added to the lead time required normally for planning, manufacture of equipment, and construction, would seriously hinder the efforts of publicly owned utilities to provide adequate supplies of electricity to their consumers.

C. Moreover, the opinion implies that use of cooling water by nuclear plants as well as fossil-fuel power plants is subject to licensing by the Federal Power Commission [4] in addition to the licensing requirements of the Atomic Energy Act. If so, the lead time for licensing and constructing atomic plants, already relatively long (nine years on the average) would be increased by several years.

3. The problem created by the opinion below is national in scope because federal dams (notably flood control dams) have been constructed or authorized for construction in all important river basins in the country for the very purpose of affecting the regimen of the river. For example, rivers such as the Missouri and Mississippi would be involved because of upstream flood control dams, although, absent such dams, the navigable character of these rivers would confer no licensing jurisdiction over steam plants, as the court of appeals held (pp. 1234-35). The opinion makes no distinction between navigable and nonnavigable streams, in its "surplus water" rationale. Steam

[4] "At a minimum, Congress surely intended to give the FPC control over the use of surplus waters for the generation of power, no matter by what mechanical force the electricity is ultimately produced." *Id.* at 1242. See also p. 1214, n. 20, referring to nuclear plants.

plants using waters of nonnavigable streams in semi-deserts below reclamation dams, *e.g.*, Salt River in Arizona, would apparently require licenses. It is difficult to believe that Congress intended to subject such uses of water by steam plants to licensing, while deliberately excluding (as the court properly held) steam plants using waters of navigable streams not affected by upstream government dams. Some difficult and contentious classifications of rivers would be required by this curious dichotomy.

4. The decision imposes great administrative difficulties. The Federal Power Act, not having been written with steam plants in mind, would not be an adequate vehicle for the processing of steam plant license applications or administration of such licenses after issuance. To name only a few problems suggested by the Act's provisions relating to hydro projects: What would constitute the "project" and "project works," under Section 3, 16 U.S.C. § 796 (11), (12)—the water diversion facilities or the whole generating plant? The power plant may be several miles from the stream. The Act's definitions of "project" and "project works" are wholly foreign to the components of a steam plant. Would the preference right of public agencies under Section 7 (16 U.S.C. § 800) apply? Would the preliminary permit provisions of Section 4(e) (16 U.S.C. § 797(e)) and Section 5 (16 U.S.C. § 798) be applicable? What would be the duration of such a license? The Act specifies a period not exceeding 50 years (Sec. 6, 16 U.S.C. § 799), and this is the usual term related to the long life of hydro projects. But the normal life of a thermal plant is of the order of 30 to 35 years. Would the plant be subject to recapture by the United States, as a

hydro project is, at the end of the license period (Sec. 14, 16 U.S.C. § 807)? Could the licensee exercise the powers of eminent domain granted by the Act to licensees of hydroelectric projects (Sec. 21, 16 U.S.C. § 814)?[5] It is impossible to fit the specifications and operations of a steam electric generating plant into the Procrustean bed of a statute designed only for hydroelectric projects. Any commission charged with the responsibility for licensing steam plants would need an entirely different set of statutory criteria and guidelines.

5. Pending before Congress are several bills which would delegate to a federal agency (but not, in all bills, to the Federal Power Commission) authority with respect to the siting and licensing of thermal power plants.[6] All such legislative proposals recognize that the licensing of thermal power plants demands statutory criteria far different from those imposed on hydroelectric facilities under the Federal Power Act, although there are differing approaches as to whether primary responsibility in this field should rest with the States (as at present) or should be newly lodged in the Federal Government, and, if so, in what agency. The court below noted in dismissing respondents' arguments that thermal electric plants are "project works" under Section 4(e) and that such arguments would be better made to Congress.[7] That same rationale would seem to apply here where, in

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[5] See Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958), illustrating the broad reach of this power.

[6] *E.g.*, H.R. 13484, H.R. 13204, 93d Cong., 2d Sess. (1974); S. 935, H.R. 180, 93d Cong., 1st Sess. (1973).

[7] 489 F.2d at 1235.

effect, the court below has subjected thermal power plants to Federal Power Commission regulation, while the Congress is in the process of deciding whether to subject any such facilities to federal regulation. Congress apparently does not believe the question was decided 54 years ago under the "surplus water" provisions of Section 4(e).

CONCLUSION

For these reasons, we ask that the petitions for certiorari of the Federal Power Commission and the Utilities be granted.

Respectfully submitted,

FRANK WILLIAM FRISK, JR.
Suite 212
2600 Virginia Ave., N.W.
Washington, D.C. 20037

Attorney for
American Public Power
Association

Supreme Court, U. S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1380

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

No. 73-1666

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Petitioners*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

No. 73-1667

FEDERAL POWER COMMISSION, *Petitioner*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

Petition for Certiorari Filed March 11, 1974, and May 6, 1974
Certiorari Granted June 10, 1974

PEERS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1974

No. 73-1380

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CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

No. 73-1667

FEDERAL POWER COMMISSION, *Petitioner*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

Petitions for Certiorari Filed March 11, 1974, and May 6, 1974
Certiorari Granted June 10, 1974

APPENDIX

[Filed September 10, 1971]

BEFORE THE FEDERAL POWER COMMISSION

Docket No.

THE CHEMEHUEVI TRIBE OF INDIANS, c/o Ralph Esquerra, 11964 South Grevilla Avenue, Hawthorne, California 96250;

THE COCOPAH TRIBE OF INDIANS, c/o Robert Barley, Somerton, Arizona;

THE SIERRA CLUB, a non-profit California corporation, 1050 Mills Tower, 220 Bush, San Francisco, California 94104;

COMMITTEE TO SAVE BLACK MESA, INC., a non-profit Arizona Corporation, c/o Robert Hilgendorf, P.O. Box 797, Chinle DNA office, Chinle, Arizona 86503;

EMMA YAZZIE, Fruitland, New Mexico 87416;

JIMMY YAZZIE, Fruitland, New Mexico 87416;

PAUL BEGAY, Kirtland, New Mexico 87417;

CHESTER HUGH BENALLY, Fruitland, New Mexico 87416;

BILL BEGAY, Fruitland, New Mexico 87416, *Complainants,*

v.

ARIZONA PUBLIC SERVICE COMPANY, 501 South Third Avenue, Phoenix, Arizona 85004;

SOUTHERN CALIFORNIA EDISON COMPANY, 601 West Fifth, Los Angeles, California 90017;

PUBLIC SERVICE COMPANY OF NEW MEXICO, 414 Silver, S.W., Albuquerque, New Mexico 87103;

SALT RIVER PROJECT, 1521 Project Drive, Phoenix, Arizona;

TUCSON GAS AND ELECTRIC COMPANY, 220 West Sixth Street, Tucson, Arizona 85705;

EL PASO ELECTRIC COMPANY, 215 North Stanton Street, El Paso, Texas 79901;

LOS ANGELES DEPARTMENT OF WATER & POWER, 111 North Hope, Los Angeles, California 90012;

NEVADA POWER COMPANY, Fourth and Stewart Avenue, Las Vegas, Nevada 89110;

UTAH POWER & LIGHT COMPANY, 1407 West North Temple, Salt Lake City, Utah;

SAN DIEGO GAS & ELECTRIC COMPANY, 101 Ash, San Diego, California 92101, *Complainees.*

Complaint, Petition for Order to Show Cause and Request for Expedited Procedure

Come Now the Chemehuevi Tribe, the Cocopah Tribe, the Sierra Club, Committee to Save Black Mesa, Inc., Emma Yazzie, Jimmy Yazzie, Paul Begay, Chester Hugh Benally and Bill Begay ("complainants"), and file this complaint and petition for order to show cause pursuant to 18 C.F.R. § 1.6, and request the Commission to exercise its licensing jurisdiction under Part I of the Federal Power Act by ordering the above-captioned complainees to obtain licenses to construct, operate, and/or maintain the following existing or proposed fossil fuel generating facilities which will be owned and operated by the complainees ("the six plants"):

a. Four Corners plant, units 1 through 5, located on the Navajo Indian Reservation, sixteen miles southwest of Farmington, New Mexico. Current installed capacity is 2,075 megawatts; proposed total capacity is approximately 6,000 megawatts.

b. Mohave plant, two units, one operating and one under construction, located on the Nevada side of the Colorado River, three miles downstream from the Davis Dam. Total installed capacity will be 1,580 megawatts.

c. Navajo plant, three units planned, located on the Navajo Indian Reservation four miles east of Page, Arizona. Total proposed capacity is 2,310 megawatts.

d. San Juan plant, located sixteen miles northwest of Farmington, New Mexico, and ten miles from the Four Corners plant. Part of the plant facilities will be on federal land. Planned initial capacity is 330 megawatts; ultimately 990 megawatts.

e. Huntington Canyon plant, at least two units, located twenty-nine miles southwest of Price, Utah, in part, on federal land. Initial installed capacity is to be 430 megawatts; ultimate capacity may reach 2,000 megawatts.

f. Kaiparowits plant, initial planned installed capacity of 2,000 megawatts in two units, ultimately 5,000 megawatts; located on federal land in Utah, in part within the Glen Canyon Recreational Area, about twenty miles north of Page, Arizona and the Navajo plant.

The Commission is also requested to omit the intermediate decision procedure, set an accelerated briefing schedule as described hereinafter, and render a final opinion pursuant to 18 C.F.R. § 1.30(c).

The Parties

1. Complainant Chemehuevi Tribe of Indians is a recognized tribe of American Indians which adopted a constitution and by-laws on the 14th day of February, 1970, pursuant to the statutory authority provided in the Act of June 18, 1934 (48 Stat. 984) as amended by the Act of June 15, 1935 (49 Stat. 378). The Chemehuevi Reservation, consisting of approximately 28,000 acres, is situated on the Colorado River in the County of San Bernardino, State of California, downstream from all the plants; the Mohave plant is approximately forty miles to the north. The Chemehuevi Tribe's water rights in the Colorado River were defined by the United States Supreme Court in *Arizona* v. *California*, 373 U.S. 546 (1963). The Tribe is vitally interested in and affected by the operation of all the plants, since their operations reduce the flow of the Colorado River and its tributaries, thus affecting their rights to that water. In addition, the health and welfare of the Tribe is threatened by air and water pollution caused by operation of the Mohave plant and other plants in the Four Corners area, as hereinafter described.

2. The Cocopah Tribe of the Cocopah Indian Reservation, Arizona, is a tribe of Indians, organized and recognized by the Secretary of Interior in accordance with the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378) and

pursuant to which laws it functions as a legal identity. The Cocopah Tribe has, for many centuries, resided along the banks of the Colorado River, south of Yuma, Arizona, downstream from all the plants, drawing its subsistance from fishing and planting crops along the river's edge. Any diminution in the quality or quantity of the water in the river would vitally affect the Tribe's economic welfare.

3. Complainant Sierra Club is a non-profit corporation organized and operated under the laws of the State of California since 1892, with its principal place of business in San Francisco, California. Membership of the Club is approximately 140,000 nationally. The Sierra Club also maintains chapters in the Southwestern United States. Membership in these chapters is approximately 2,650. For many years, the Sierra Club by its activities and conduct has exhibited a special interest in the conservation and sound maintenance of national parks, national recreation areas, national forests, game refuges, and other unspoiled, wild, and scenic areas in the United States. One of the principal objectives of the Sierra Club is to protect and conserve the unparalleled scenic and recreational attractions of the Southwestern United States. Included in this area are the Grand Canyon, Bryce Canyon and Zion National Parks, Lake Powell and the Glen Canyon Recreational area, Lake Mead and its recreation area. Most of this area consists of federal and Indian land. The Sierra Club's interests would be vitally affected by the acts hereinafter described and the Club would be aggrieved by those acts.

4. Complainant Committee to Save Black Mesa, Inc. is a non-profit corporation organized and operated under the laws of the State of Arizona, with its principal place of business in Chinle, Arizona, on the Navajo Indian Reservation. The Committee's membership consists of approximately 100 persons of Indian and non-Indian origin. The principal objective of the Committee is to disseminate information regarding the religious, cultural and environ-

mental consequences of any proposed or existing power plant construction or mining activity on or near the Navajo Indian Reservation. All members of the Committee reside on the Reservation and their health, welfare and esthetic enjoyment of the area will be adversely affected by the operations of the electrical generating plants and their related facilities.

5. Complainants Emma Yazzie, Jimmy Yazzie, Paul Begay, Chester Hugh Benally, and Bill Begay are all Navajo Indians residing on the Navajo Reservation within one mile of the Four Corners power plant. Their health and welfare is severely threatened by the operations of the Four Corners plant and other plants in the area, as hereinafter described.

6. Complainees are all public utilities subject to the Commission's jurisdiction under Part II of the Federal Power Act, operating in the Southwest area and California. The complainees, through joint ownership and cooperative operation of facilities, plan to create a vast power pool in the Southwestern United States. The six plants are a part of this power pool plan. This energy will be transmitted in interstate commerce to distant load centers, the closest of which is 160 miles and the farthest 600 miles from the six plants, by extra high voltage transmission lines ranging from 230 to 500 kilovolts.

Jurisdiction of the Commission

7. Complainees are constructing, operating and maintaining or are planning to construct, operate and maintain water conduits, reservoirs, power houses, transmission lines, and other project works for the development, transmission and utilization of electric power across, along and in navigable waters, as defined by 16 U.S.C. § 796(8). Large quantities of water for cooling and other plant purposes will be withdrawn from the following navigable bodies of water, all part of the Colorado River system:

a. Four Corners plant—San Juan River, approximately 34,000 acre feet per year.

b. Mohave plant—Colorado River, approximately 30,000 acre feet per year.

c. Navajo plant—Lake Powell, approximately 34,100 acre feet per year.

d. San Juan plant—San Juan River, approximately 20,200 acre feet per year.

e. Huntington Canyon plant—Huntington Creek, approximately 30,000 acre feet per year.

f. Kaiparowits plant—Lake Powell, approximately 102,000 acre feet per year.

These withdrawals will affect navigability, since pumping structures are and will be located across, along and in the above-mentioned bodies of water; the water level of these bodies will be lowered due to these withdrawals. In addition, the Navajo and Kaiparowits plants will use surplus water impounded by the Glen Canyon Dam, a "government dam," as defined by 16 U.S.C. § 796(10).

8. The complainees are constructing, operating and maintaining the six plants without licenses granted pursuant to Part I of the Federal Power Act, 16 U.S.C. § 791(a) *et seq.*, and do not possess permits or valid existing rights-of-way granted prior to June 10, 1920.

9. Some of the six plants are or will be located on the public lands and reservations of the United States as defined by 16 U.S.C. § 796(2) (see Paragraph 1). The construction and operation of each of the plants will interfere and be inconsistent with the purposes for which the "reservations" (16 U.S.C. § 796(2)) on which they are located were created.

EFFECTS ON INDIAN RESERVATIONS

10. The Chemehuevi Indian Reservation, which is a "reservation" within the meaning of 16 U.S.C. § 796(2), was

created to provide the Tribe with a permanent homeland for its sole use and benefit. The economic development of the Chemehuevi Indian Reservation will be oriented towards recreation, and the Tribe is absolutely dependent on clear air and pure water. The plants, all located upstream from the Reservation, threaten to interfere with the Tribe's beneficial use of the Reservation for recreational and other purposes by polluting the air and interfering with the quality and quantity of its water.

11. The Navajo and Four Corners plants are located on the Navajo Indian Reservation. The San Juan and Kaiparowits plant sites are within a few miles of the Reservation and coal for the Navajo, Mohave and Four Corners plants is or will be strip mined on the Navajo Reservation and on land deemed jointly owned by Navajos and Hopis. The Navajo Indian Reservation, which is a "reservation" within the meaning of 16 U.S.C. § 796(2), was created to provide a permanent abiding place and to preserve the religion, culture and way of life of the Navajos. These electrical generating plants and their ancillary facilities may create air and water pollution, and potential health hazards, threaten the ecological balance of the area, and may affect agricultural and grazing lands upon which the individual complainants depend for their livelihood.

12. The Cocopah Reservation, which is a "reservation" within the meaning of 16 U.S.C. § 796(2), was created to provide the tribe with a permanent homeland for its sole use and benefit and to preserve the culture and way of life of the Cocopahs. The six plants, all located upstream from the Reservation, threaten to interfere with the Tribe's beneficial use of the Reservation for fishing, agricultural, and other purposes by lowering the quality and quantity of water in the Colorado River.

EFFECTS ON RESOURCES, WATER QUALITY, SCENIC BEAUTY, AIR QUALITY, RECREATION AND THE CONSERVATION OF NATURAL RESOURCES

13. Construction, operation, and maintenance of the six plants are not best adapted to a comprehensive plan for improving or developing the Colorado River waterway, and are not best adapted for other beneficial public uses, or for recreational purposes. They pose a threat to natural, scenic, cultural, historical, and recreational resources, including national parks and recreation areas, wilderness areas, historical sites and areas sacred to the religious practices of the Navajos. In addition, the operations of the six plants may threaten commercial and recreational fishing and wildlife. Various aspects of the project works may cause air and water pollution, visual pollution, noise pollution, erosion, and ecological dislocations which may have long-term and possibly irreversible effects.

14. The area in which the six plants are to be built includes some of America's most renowned scenic and cultural areas, visited by millions of Americans and foreign travelers each year. Within a 200 miles radius of the Four Corners, San Juan, Navajo and Kaiparowits plants, or a 100 mile radius of the Mohave and Huntington Canyon plants, there are seventy-two properties listed in the National Register of Historic Places, six national parks, three national recreational areas and numerous camping, fishing, swimming, boating, hiking, skiing, hunting and other recreational sites. Thirty-three of the properties listed in the National Register have been designated National Historic Landmarks by the Secretary of the Interior (see Exhibit A attached hereto). In addition, there are thirty-eight Indian reservations in the area, on which live more than half the Indians residing on reservations in the United States (see Exhibit B attached hereto). These national parks, and recreational areas fulfill the needs of the general public to escape the pressures and congestion of urban areas. There is a clear national policy to protect scenic and recreational

areas and the Federal Power Commission, under its licensing authority and the judicial pronouncements interpreting that authority, is charged with the duty to implement that national policy.

ORDER TO SHOW CAUSE

15. Complainants ask the Commission to issue an order pursuant to 18 C.F.R. § 1.6, directing the complainees to show cause why they should not be restrained from any further development, planning and construction of the six power plants pending a final Commission decision on this complaint and petition.

16. Complainants request that the complainees be ordered to file their response to this complaint and petition within 30 days of the filing date of this complaint and petition, pursuant to 18 C.F.R. § 1.6. Complainants also request that the Commission forthwith render a final opinion and waive the intermediate decision, in accordance with 18 C.F.R. § 1.30(c). Due and timely execution of the Commission's functions imperatively and unavoidably requires omission of the intermediate decision procedure (see paragraphs 17 and 18). Complainants suggest the following schedule: that the Commission order the filing of simultaneous initial briefs thirty days after the complainees respond to this complaint and petition; that simultaneous responding briefs be filed fifteen days thereafter; and that oral argument be scheduled fifteen days after the filing of the responding briefs.

17. Four of the six plants are not yet in operation. Three, San Juan, Navajo and Huntington Canyon, are in the initial stages of construction. The Kaiparowits plant is still in the planning stage; actual construction has not yet begun. At the Four Corners plant, three additional units are proposed; on information and belief, final plans have not yet been adopted for these additional units. Thus, major components of five of the plants remain incomplete and

could be subject to Commission guidance and supervision if the Commission determines that these facilities are jurisdictional. As each day passes, more time and money is invested by the complainees, in the construction of San Juan, Navajo, and Huntington Canyon and the planning of Kaiparowits and the additional units at Four Corners without Commission review of the location and design of those plants. The more time and money invested by the complainees, the greater their potential losses should the Commission ultimately decide that the plants should not be licensed, or that their design or location should be substantially modified.

18. The Commission can and should act in aid of its own jurisdiction. It frequently imposes numerous and substantial conditions on its licensees regarding design, location, methods of operation and pollution control facilities. Unless the Commission acts quickly to resolve the jurisdictional issue, the practical possibility of imposing substantial conditions will be significantly reduced or even precluded entirely, since construction will have proceeded beyond a point where significant modifications will be practicable.

19. For these reasons, the Commission should act quickly to preserve the status quo pending its determination regarding the requirement for Part I licensing of the six plants. This complaint and petition presents no issues of fact. It presents a single legal issue: does the Federal Power Commission have licensing jurisdiction over steam plants generating and transmitting energy in interstate commerce, which withdraw large quantities of water from navigable streams for cooling and other plant purposes? Since this is purely a question of law, it is susceptible of resolution without a hearing. Undoubtedly, there will be numerous disputes requiring a full evidentiary hearing at a later date, once the Commission has determined the threshold question of its jurisdiction. To set this matter down for a full evidentiary hearing at this early date would

be a great waste of time and money for all concerned. The complainants, whose resources are meager, would be required to transport witnesses and their attorneys to Washington, and to pay experts' fees. The complainees would be required to counter these witnesses, thus imposing a large and unnecessary expense on their rate payers. And the Commission's already overcrowded docket will be further burdened by a lengthy and complicated series of proceedings which may well be totally unnecessary. Thus, complainants believe that it will be in the best interests of all concerned to defer an evidentiary hearing until a later date, since a negative decision on the legal issue of jurisdiction would render an evidentiary hearing meaningless. Therefore, the complainants respectfully request the intermediate hearing and decision be waived and that all parties address themselves to the legal question in briefs and oral argument before the Commission.

WHEREFORE, complainants pray that the Commission:

1. Issue an order directing the complainees to show cause why they should not be required to apply for licenses under Part I of the Federal Power Act.

2. Issue an order directing the complainees to show cause why they should not be required to suspend all development, planning and construction of the plants in question, pending the outcome of these proceedings.

3. Omit the hearing and waive the examiner's intermediate decision and render a final Commission opinion.

4. Require that initial briefs be simultaneously filed 30 days after complainees respond to this complaint and petition; and that briefs in response be filed 15 days thereafter.

5. Set this matter for oral argument 15 days after responding briefs are filed.

6. Grant such other relief as may be appropriate to the premises.

Dated at Washington, D. C., September 10, 1971.

Respectfully submitted,

NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

JOSEPH J. BRECHER
BRUCE R. GREENE
DAVID H. GETCHES

By /s/ JOSEPH J. BRECHER
Attorneys for Chemehuevi Tribe, the Cocopah Tribe, the Sierra Club, the Committee to Save Black Mesa, Emma Yazzie, Jimmy Yazzie, Paul Begay, Chester Hugh Benally and Bill Begay

JAMES W. MOORMAN
Attorney for Sierra Club

EXHIBIT A

NATIONAL PARKS, MONUMENTS AND RECREATION AREAS AND PROPERTIES INCLUDED IN THE NATIONAL REGISTER OF HISTORIC PLACES AFFECTED BY FOUR CORNERS POWER DEVELOPMENT*

National Parks

1. Grand Canyon National Park, Arizona
2. Petrified Forest National Park, Arizona
3. Zion National Park, Utah
4. Bryce Canyon National Park, Utah
5. Canyonlands National Park, Utah
6. Mesa Verde National Park, Colorado

National Monuments

1. Grand Canyon National Monuments, Arizona
2. Canyon De Chelly National Monument, Arizona
3. Navajo National Monument, Arizona
4. Wupatki National Monument, Arizona
5. Pipe Spring National Monument, Arizona
6. Sunset Crater National Monument, Arizona
7. Walnut Canyon National Monument, Arizona
8. Tuzigoot National Monument, Arizona
9. Marble Canyon National Monument, Arizona
10. Montezuma Castle National Monument, Arizona
11. Aztec Ruins National Monument, New Mexico
12. Chaco Canyon National Monument, New Mexico
13. El Morro National Monument, New Mexico
14. Bandelier National Monument, New Mexico
15. Pecos National Monument, New Mexico

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* All parks, monuments and recreation areas are either within a 200-mile radius of the Navajo, Kaiparowits, Four Corners or San Juan plants, or within a 100-mile radius of the Mohave or Huntington Canyon plants.

16. Rainbow Bridge National Monument, Utah
17. Arches National Monument, Utah
18. Natural Bridges National Monument, Utah
19. Capitol Reef National Monument, Utah
20. Cedar Breaks National Monument, Utah
21. Timpanagos Cave National Monument, Utah
22. Hovenweep National Monument, Utah and Colorado
23. Colorado National Monument, Colorado
24. Black Canyon of the Gunnison National Monument, Colorado
25. Great Sand Dunes National Monument, Colorado
26. Yucca House National Monument, Colorado
27. Joshua Tree National Monument, California
28. Lehman Caves National Monument, Nevada

National Recreation Areas

1. Lake Mead National Recreation Area, Arizona and Nevada
2. Glen Canyon National Recreation Area, Utah
3. Curecanti National Recreation Area, Colorado

PROPERTIES INCLUDED IN THE NATIONAL REGISTER OF HISTORIC PLACES

Arizona

Canyon de Chelly National Monument
Hubbell Trading Post National Historic Site
*Casa Malpais Site
Lowell Observatory
*Merriam (C. Hart) Base Camp Site
Walnut Canyon National Monument
Wupatki National Monument
*Winona Site
Pipe Spring National Monument

Tuzigoot National Monument
Montezuma Castle National Monument
*Jerome Historic District

Colorado

Chimney Rock Archeological Site
*Pike's Stockade
Fort Garland
*Durango-Silverton Narrow Gauge Railroad
Hovenweep National Monument
Mesa Verde National Park
Yucca House National Monument
*Lowry Ruin
*Durango-Silverton Narrow Gauge Railroad
*Silverton Historic District

New Mexico

San Felip de Meri Church
*Manuelito Complex
Chaco Canyon National Monument
Francis Canyon Ruin
Tsiping
Aztec Ruins National Monument
Salmon Ruin
*Holmes Site
Pecos National Monument
*Glorieta Pass Battlefield
San Juan Mesa Ruin
Bandelier National Monument
*Sandia Cave
*Big Bend Mesa

*Barrio de Analco Historic District
Davey, Randall House
National Park Service Southwest Regional Office
*Palace of the Governors
Reredos of our Lady of Light
*Santa Fe Plaza
Glorieta Pass Battlefield
*San Lazero
*Seton Village
*El Santuario de Chimayo
Gallinar Springs Ruin
*San Jose de Gracia Church
*Las Trampas Historic District
*San Francisco de Assisi Mission Church
*Blumenshein (Ernest L.) House
*Carson (Kit) House
*Taos Pueblo
*Abo
*Quarel
San Estaben de Rey Mission Church
*Acoma
El Morro National Monument
Haulkuh

Utah

Beaver County Courthouse

---

* National Historic Landmarks, as designated by the Secretary of the Interior.

EXHIBIT B

INDIAN RESERVATIONS IN NEW MEXICO, COLORADO, UTAH AND ARIZONA AFFECTED BY THE OPERATIONS OF THE SIX POWER PLANTS

Acoma
Campe Verde
Chemehuevi
Cochiti
Cocopah
Colorado River
Port Apache
Fort Mohave
Fort Yuma
Havasupai
Hopi
Hualapai
Isleta
Jemez
Jicarilla Apache
Kaibab
Laguna
Nambe
Navajo
Picuris
Pojoaque
Sandia
San Felipe
San Il Defonso
San Juan
Santa Ana
Santa Clara
Santa Domingo
Southern Ute
Taos
Tesuque
Uintah & Ouray
Ute Mountain
Yavapai
Zia
Zuni

BEFORE THE FEDERAL POWER COMMSSION

DOCKET NO. E-7664

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Complainants,*

v.

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Defendants.*

Answer of Defendant, Utah Power & Light Company

Service of pleadings, documents or communications upon Utah Power & Light Company shall be made upon its attorneys, Sidney G. Baucom and Robert Gordon, P. O. Box 899, Salt Lake City, Utah 84110.

COMES Now Utah Power & Light Company, one of the defendants (styled as "Complainees" in the Complaint) in the above-entitled matter and for answer to the Complaint and Petition on file herein admits, denies and alleges as follows:

Answering the unnumbered paragraph on page 3 of the Complaint and subparagraphs a, b, c, d, e and f thereunder, appearing on pages 3 and 4 of the Complaint, this defendant denies that the Commission has jurisdiction to order the defendant to obtain licenses to construct, operate and maintain its Huntington Canyon Plant, and with respect to subparagraph e on page 4 of the Complaint, this defendant denies that its said Plant or any part thereof is on Federal land.

1. Answering paragraph 1, this defendant does not have sufficient information to admit or deny the allegations contained in the first four sentences of said paragraph and therefore denies the same, and defendant denies each and every allegation contained in the last sentence of said paragraph 1 insofar as same pertain to this defendant's Huntington Canyon Plant.

2. Answering paragraph 2, this defendant does not have sufficient information to admit or deny the allegations contained therein and therefore denies the same.

3. Answering paragraph 3, this defendant does not have sufficient information to admit or deny the allegations contained therein and therefore denies the same.

4. Answering paragraph 4, this defendant does not have sufficient information to admit or deny the allegations contained there and therefore denies the same.

5. Answering paragraph 5, this defendant does not have sufficient information to admit or deny the allegation contained in the first sentence of said paragraph 5 and specifically denies the allegations contained in the second sentence of said paragraph as same pertain to this defendant's Huntington Canyon Plant.

6. Answering paragraph 6, this defendant denies the allegations contained therein.

7. Answering paragraph 7, this defendant admits that it is constructing a water conduit and reservoir for its Huntington Canyon Plant but denies all other allegations of said paragraph as same relate to said Plant.

8. Answering paragraph 8, this defendant admits that it does not have a Federal Power Commission license for its Huntington Canyon Plant and denies all other allegations contained in said paragraph.

9. Answering paragraph 9, this defendant denies the allegations contained therein as same pertain to defendant's Huntington Canyon Plant.

10. Answering paragraph 10, this defendant does not have sufficient information to admit or deny the allegations contained therein and therefore denies the same.

11. Answering paragraph 11, this defendant does not have sufficient knowledge to admit or deny the allegations therein relative to the Navajo, Four Corners, San Juan, Mohave and Kaiparowits Plants, but denies any and all allegations in said paragraph as they may pertain to defendant's Huntington Canyon Plant.

12. Answering paragraph 12, this defendant does not have sufficient information to admit or deny the allegations contained therein and therefore denies the same.

13. Answering paragraph 13, this defendant denies each and every allegation therein as same pertain to defendant's Huntington Canyon Plant.

14. Answering paragraph 14, this defendant denies each and every allegation therein as same pertain to defendant's Huntington Canyon Plant.

15. Answering paragraph 15, this defendant admits the allegations contained therein but alleges that said allegations are not sufficient as a matter of law to permit issuance of an order to show cause pursuant to the provisions of 18 C.F.R. § 1.6.

16. Answering paragraph 16, this defendant denies that the provisions of 18 C.F.R. § 1.6 are applicable to the instant Complaint and defendant does not concur in complainants' request for waiver of the intermediate decision procedure.

17. Answering paragraph 17, this defendant admits that its Huntington Canyon Plant is not yet in operation and is in the initial stages of construction, but defendant alleges that contractual commitments have been made for major components of said Plant. This defendant has no knowledge to admit or deny allegations relative to the other Plants as set forth in paragraph 17, and therefore denies the same.

18. Answering paragraph 18, this defendant denies that its Huntington Canyon Plant is a jurisdictional facility and defendant alleges that its said Plant will comply with all applicable laws, rules and regulations, relative to pollution control facilities and otherwise, which are properly within the jurisdiction of various Federal and state commissions and agencies and other regulatory bodies.

19. Answering paragraph 18, this defendant denies the allegations contained therein.

20. This defendant specifically denies each allegation contained in complainants' Complaint and Petition which is not specifically admitted in this Answer.

First Affirmative Defense

The Complaint fails to state a cause of action against this answering defendant upon which relief can be granted.

Second Affirmative Defense

Complainants are barred from the relief sought herein by laches. Complainants' claims could have been timely raised and determined prior to the present stage of development and contractual commitment relating to this defendant's Huntington Canyon Plant.

Third Affirmative Defense

This Commission lacks jurisdiction of the subject matter of the complainants' Complaint and Petition and therefore cannot grant the relief requested.

Wherefore, defendant, Utah Power & Light Company, having fully answered the allegations in complainants' Complaint and Petition, prays that same be dismissed and that complainants take nothing thereby.

Sidney G. Baucom
Robert Gordon

By /s/ Robert Gordon
Attorneys for Defendant,
Utah Power & Light Company
P. O. Box 899
Salt Lake City, Utah 84110

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; John A. Carver, Jr., Albert B. Brooke, Jr., and Pinkney Walker.

Docket No. E-7664

The Chemehuevi Tribe of Indians, et al.

v.

Arizona Public Service Company, et al.

Order Dismissing Complaint

(Issued November 4, 1971)

On September 10, 1971, The Chemehuevi Tribe of Indians, the Cocopah Tribe of Indians, the Sierra Club, the Committee to Save Black Mesa, Inc., Emma Yazzie, Jimmy Yazzie, Paul Begay, Chester Hugh Benally, and Bill Begay (complainants) filed a complaint and petition for order to show cause pursuant to 18 C.F.R. § 1.6, requesting the Commission to determine a ". . . single legal issue: does the Federal Power Commission have licensing jurisdiction over steam plants generating and transmitting energy in interstate commerce, which withdraw large quantities of water from navigable streams for cooling and other plant purposes?" (complaint, para. 19). The complaint seeks to invoke licensing jurisdiction of this Commission granted pursuant to Part I of the Federal Power Act, 16 U.S.C. 792-823 (complaint, paras. 7-9).

The Commission may, at any stage of a proceeding, make a determination of its jurisdiction and may do so on its own motion as well as upon request of the parties. All of the parties cited as "complainees" by complainants have not responded to the complaint.[1] The issue of jurisdiction is

[1] The Secretary, by notice dated October 19, 1971, extended the time within which to respond to the complaint, to on or before November 9, 1971. The cited respondents include Arizona Public

clear and warrants disposition of this matter upon the complainants' pleadings without the necessity of further answers or briefing. The complaint must be dismissed.

The authority of this Commission to license facilities under Part I of the Federal Power Act is that of licensing project works. *Lake Ontario Land Development & Beach Protection Ass'n* v. *Federal Power Commission*, 212 F.2d 227, 232 (CADC, 1954), *cert. denied*, 347 U.S. 1015 (1954). They are defined in the Act, 16 U.S.C. § 796(12), as the physical structures of a project. Project is defined as follows, 16 U.S.C. § 796(11):

> "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system, or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

The thermal electric generating stations referred to in the complaint,[2] are not properly classifiable as project works within the meaning of Part I of the Federal Power Act, which was originally enacted as the Federal Water Power

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Service Company, Southern California Edison Company, Public Service Company of New Mexico, Salt River Project, Tucson Gas and Electric Company, El Paso Electric Company, Los Angeles Department of Water & Power, Nevada Power Company, Utah Power & Light Company, and San Diego Gas & Electric Company.

[2] Four Corners plant, Mohave plant, Navajo plant, San Juan plant, Huntington Canyon plant, and Kaiparowits plant.

Act, approved June 10, 1920 (41 Stat. 1063). By Title II of the Public Utility Act of 1935 (49 Stat. 838), the original Federal Water Power Act, with certain clarifying amendments, was made Part I of the Federal Power Act. The preamble of the Federal Water Power Act (41 Stat. 1063), specifies that one of the purposes of that legislation was to provide for the development of water power. Steam power is not mentioned. Moreover, the legislative history shows that it was not intended that the licensing of thermal stations be included.

This construction of the Commission's licensing jurisdiction under Part I of the Federal Power Act has been the long-standing interpretation of the Commission. See First Annual Report of the Federal Power Commission, pp. 51-52 (1921); Forty-Fourth Annual Report of the Federal Power Commission, pp. 10-11 (1964); and Forty-Fifth Annual Report of the Federal Power Commission, p. 159 (1965). It has been recognized favorably by the Supreme Court. See *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, 110 (1965).

The Commission further finds:

The Commission is without jurisdiction to grant the substantive licensing relief requested by complainants in their complaint and petition.

The Commission orders:

Complainants' complaint and petition, filed September 10, 1971, is dismissed for lack of Commission jurisdiction.

By the Commission.
(SEAL)

KENNETH F. PLUMB,
Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. E-7664

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Complainants,*

v.

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Complainees.*

Application for Rehearing

On September 10, 1971, the complainants in this proceeding filed a complaint and petition for order to show cause naming ten public utilities as complainees. The complaint and petition is addressed to the Commission's alleged jurisdiction over coal-fired, steam electrical generating plants. The six plants in question [1] withdraw huge quantities of water from navigable streams and generate and transmit electric energy in interstate commerce. The complainants contend that the Commission has Part I licensing jurisdiction over these facilities.

On November 4, 1971, the Commission issued an "Order Dismissing Complaint." That order relied upon the Commission's long standing history of not regulating these types of facilities and upon the literal reading of 16 U.S.C. § 796(11). In addition, the Commission's order stated that the United States Supreme Court "recognized favorably" this position of not regulating steam plants in *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, 110 (1965) [the "*Taum Sauk*" case].

Complainants believe the Commission erred by its order for the following reasons, and should grant rehearing, pursuant to 16 U.S.C. § 825*l*.

First, the literal language of 16 U.S.C. § 797(e), the operative section of the Act, supports the complainants' posi-

[1] Mohave, Huntington Canyon, San Juan, Four Corners, Navajo and Kaiparowits.

tion that the type of facilities in question are jurisdictional. That section authorizes and empowers the Commission

> [t]o issue licenses . . . to any corporation organized under the laws of . . . any State . . . for the purpose of constructing, operating, and maintaining . . . water conduits . . . power houses, transmission lines, or other project works necessary or convenient for . . . the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction . . . or upon any part of the public lands and reservations of the United States . . . or for the purpose of utilizing the surplus water . . . from any government dam . . . .

The facts in this case demonstrate clearly that water conduits, power houses and transmission lines have been and are being constructed for the purposes of generating and transmitting electricity in interstate commerce; that surplus water from behind the Bureau of Reclamation's Glen Canyon Dam will be utilized for this purpose; and that much of the facilities in question will be and are located on public lands and reservations of the United States.

Second, the Commission relied upon the fact that since its inception, it has consistently declined to regulate the types of facilities in question.[2] However, mere consistent failure to regulate is not conclusive of the jurisdictional issue. In the *Phillips* case,[3] the Commission argued in the Supreme Court of the United States that it has "consistently interpreted the [Natural Gas] act as not conferring jurisdiction over companies such as Phillips [gas producers]." But the Court summarily dismissed this contention, at 347 U.S. 368, by stating that ". . . for that matter,

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[2] It should be noted that the complaint and petition is addressed *only* to the six plants referred to in that document.

[3] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

even consistent error is still error." See also *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), where the Supreme Court held that even though the Federal Communications Act did not explicitly establish F.C.C. jurisdiction, the Commission had jurisdiction over cable television.

Lastly, the order suggests that the Supreme Court has already decided the issue presently before the Commission in the *Taum Sauk* case. The issue in that case was whether or not the Commission's jurisdiction extended to pumped storage projects which generated and transmitted energy in interstate commerce, but which had no effect on navigable waterways. There, unlike this case, the F.P.C. was urging that its jurisdiction be extended. The would-be licensee argued that if the Commission's position were sustained, it should also have jurisdiction over steam plants All parties in that litigation assumed that the Commission did not have jurisdiction over steam plants. Thus the issue was not properly before the court, both as to the facts and as to the contentions of the parties. The Court's language was mere *obiter dictum* and, therefore, not binding upon this Commission.

For these reasons, the Commission should grant rehearing, vacate its Order Dismissing Complaint, and grant the relief requested in complainants' complaint and petition for order to show cause.

Respectfully submitted,

NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
Telephone (303) 447-8760
JOSEPH J. BRECHER
BRUCE R. GREENE
DAVID H. GETCHES

By /s/ BRUCE R. GREENE

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; John A. Carver, Jr., Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

DOCKET No. E-7664

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.
v.
ARIZONA PUBLIC SERVICE COMPANY, ET AL.

Order Denying Application for Rehearing

(Issued December 10, 1971)

On November 12, 1971, application for rehearing of an order dismissing complaint issued November 4, 1971, was filed by the Chemehuevi Tribe of Indians, the Cocopah Tribe of Indians, the Sierra Club, the Committee to Save Black Mesa, Inc., Emma Yazzie, Jimmy Yazzie, Paul Begay, Chester Hugh Benally, and Bill Begay (Complainants).

The respondents are Arizona Public Service Company, Southern California Edison Company, Public Service Company of New Mexico, Salt River Project, Tucson Gas and Electric Company, El Paso Electric Company, Los Angeles Department of Water & Power, Nevada Power Company, Utah Power & Light Company, and San Diego Gas and Electric Company.

The Commission finds:

The application for rehearing filed by Complainants presents no new facts or principles of law which were not fully considered by the Commission in its order of November 4, 1971, or which, having now been considered warrant any modification of that order.

The Commission orders:

The application for rehearing filed by Complainants on November 12, 1971, is denied.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-2012

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent,*

ARIZONA PUBLIC SERVICE COMPANY,
SAN DIEGO GAS & ELECTRIC COMPANY,
UTAH POWER & LIGHT COMPANY,
DEPARTMENT OF WATER & POWER OF THE CITY OF L.A.,
EL PASO ELECTRIC COMPANY,
NEVADA POWER COMPANY,
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT &
POWER DISTRICT
SOUTHERN CALIFORNIA EDISON COMPANY,
TUCSON GAS & ELECTRIC COMPANY, *Intervenors.*

Motion for Leave to File Supplemental Brief

At oral argument in this case, counsel for the Intervenors argued, for the first time, that the Federal Power Commission does not have jurisdiction over the power plants that are the subject of this action because the exclusive control of Colorado River is vested in the Secretary of the Interior. Of course, Petitioners were not prepared to respond completely to this novel argument at the time.

Aside from this contention being raised far too late in the proceedings, it is utterly devoid of merit. Petitioners ask leave to file the attached supplemental brief in order to dispose of this argument and relieve the court of the burden of considering it further.

WHEREFORE, movants request the court to order the attached supplemental brief on this question to be filed.

Respectfully submitted,

/s/ JOSEPH J. BRECHER
Joseph J. Brecher

BRUCE R. GREENE
DAVID H. GETCHES
1506 Broadway
Boulder, Colorado 80302

EDWARD BERLIN, ESQ.
BERLIN, ROISMAN AND KESSLER
1712 "N" Street, N.W.
Washington, D.C. 20036

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-2012

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent,*

ARIZONA PUBLIC SERVICE COMPANY,
SAN DIEGO GAS & ELECTRIC COMPANY,
UTAH POWER & LIGHT COMPANY,
DEPARTMENT OF WATER & POWER OF THE CITY OF L.A.,
EL PASO ELECTRIC COMPANY,
NEVADA POWER COMPANY,
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT &
POWER DISTRICT
SOUTHERN CALIFORNIA EDISON COMPANY,
TUCSON GAS & ELECTRIC COMPANY, *Intervenors.*

Petitioners' Supplemental Brief

At oral argument, counsel for Intervenors attempted to argue that the Federal Power Commission does not have jurisdiction over the six power plants involved in this case because control of the Colorado River is vested exclusively in the Secretary of the Interior. It is true that the Secretary has special duties and responsibilities for allocating Colorado River waters under the complex "law of the River." However, the several statutes establishing those duties and responsibilities did not divest the Federal Power Commission of jurisdiction over projects on the Colorado River under Part I of the Federal Power Act.

For example, Section 6 of the Boulder Canyon Project Act (43 U.S.C. § 617(e)) describes the responsibilities of the Department of Interior for operating the Boulder Canyon Dam and the water it impounds. The last paragraph of Section 6 clearly contemplates that Federal Power Commission jurisdiction over the river shall continue:

> The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said

> Federal Water Power Act upon or affecting the Colorado River or any of its tributaries . . . *until this Act shall become effective* . . . (Emphasis Added)

The Boulder Canyon Project Act has been effective since June 25, 1929. (46 Stat. 3000) Therefore, the temporary suspension of FPC jurisdiction contemplated by that Act has expired.

Indeed, the Commission and the Interior Department agree that the FPC has jurisdiction to license projects along the Colorado River. During the early 1960's, the Commission conducted licensing proceedings for a proposed dam and hydro-electric project at Marble Canyon, fifty-five miles downstream from the Glen Canyon Dam. During the course of those hearings, the Commission first allowed limited intervention by the Secretary of the Interior, in order to present his views on the best comprehensive plan for river development. *Arizona Power Authority*, Project No. 2248, 28 FPC 769 (1962). Later, the Commission granted full intervenor's status to the Interior Department, with leave to file an alternate plan for the development of the Colorado River. 30 FPC 494. Thus, it is plain that both the Commission and the Interior Department agree that FPC jurisdiction obtains on the Colorado River.

Respectfully submitted,

/s/ Joseph J. Brecher
Joseph J. Brecher

Bruce R. Greene
David H. Getches
1506 Broadway
Boulder, Colorado 80302

Edward Berlin, Esq.
Berlin, Roisman and Kessler
1712 "N" Street, N.W.
Washington, D.C. 20036

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-2012

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Intervenors*

Memorandum

During oral argument in the above-captioned proceeding, the Court indicated to Counsel for intervenors that additional documentary material could be lodged with this Court. Pursuant thereto, Intervenors are filing the attached documents: (1) tabulation showing the water allocation authorizations to the plants involved in this proceeding, and (2) an Appendix to the Testimony of John N. Nassikas, Chairman, Federal Power Commission, before the Committee on Commerce, U. S. Senate, June 1, 1972.

Respectfully submitted,

/s/ HARRY A. POTH, JR.
Harry A. Poth, Jr.

RICHARD M. MERRIMAN
PEYTON G. BOWMAN, III
REID & PRIEST
1701 K Street, N.W.
Washington, D.C. 20006

PLANT	STATUS OF PLANT	SOURCE OF WATER	WATER ALLOCATION (Acre ft.)	AUTHORIZATION *
Four Corners (New Mexico)	Operational 5 Units	San Juan River	39,000	N. Mexico Permit 2838 (10/10/58)
San Juan (New Mexico)	Under Construction 1 Unit	San Juan River	20,200	Contract No. 14-06-400-4821 (4/11/68) Between Sec. of Interior and Public Service Company of N.M. Senate Joint Resolution 123, Public Law 90-272
Navajo (Arizona)	Under Construction 3 Units	Lake Powell	34,100	Glen Canyon Unit, Colorado River Storage Project Contract No. 14-06-400-5033 (1/17/69) 43 U.S.C.A. 1523(d)
Kaiparowits (Utah)	Planning Stage	Lake Powell	102,000	Glen Canyon Unit, Colorado River Storage Project Contract No. 14-06-400-5139 (10/2/69)
Mohave (Nevada)	Operational 2 Units	Colorado River Below Davis Dam	30,000	Contract No. 14-06-300-1876 (10/26/66) Between the Sec. of Interior and Colorado River Commission of Nevada

PLANT	STATUS OF PLANT	SOURCE OF WATER	WATER ALLOCATION (Acre ft.)	AUTHORIZATION *
				Water User's Contract No. 14-06-300-1877 (10/26/66) Between Colorado River Commission of Nevada and Southern Calif. Edison Co.
Huntington Canyon (Utah)	Under Construction 1 Unit	Huntington Creek	12,000	Water acquired from private interests
See generally				Boulder Canyon Project Act, 43 U.S.C.A. §§ 617, 617(d) & (e) *Arizona* v. *California*, 376 U.S. 340, at 342 (1964)

* Senate Rep. No. 92-1015, "Problems of Electrical Power Production in the Southwest," Sen. Com. on Interior & Insular Affairs, June 30, 1972, further states with respect to the above power plants (p. 40): "[T]he Secretary of the Interior should carry out continuing and independent monitoring of the powerplant and mining operations to insure compliance with the provisions of contracts, permits, and leases to which the Secretary and the Indian tribes are parties. Wherever infringements are found to exist, the Secretary should take whatever action is indicated to insure compliance, through existing water quality enforcement procedures or if necessary through legal action under the contract provisions."

[Filed Nov. 9, 1973]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1973

No. 71-2012

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

ARIZONA PUBLIC SERVICE COMPANY,
SAN DIEGO GAS & ELECTRIC COMPANY,
UTAH POWER & LIGHT COMPANY,
DEPARTMENT OF WATER & POWER OF THE
CITY OF LOS ANGELES,
EL PASO ELECTRIC COMPANY,
NEVADA POWER COMPANY,
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
& POWER COMPANY,
SOUTHERN CALIFORNIA EDISON COMPANY, and
TUCSON GAS & ELECTRIC COMPANY, *Intervenors*

PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Before: Wright, Tamm and McCree,* Circuit Judges

Judgment

This cause came on to be heard on a petition for review of orders of the Federal Power Commission and was argued by counsel. On consideration of the foregoing, it is

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* Of the Sixth Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a).

ORDERED AND ADJUDGED by this Court that this case is hereby remanded to the Federal Power Commission for further proceedings not inconsistent with the opinion of this Court filed herein this date.

Per Curiam

For the Court

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

Date: November 9, 1973

Opinion for the Court filed by Circuit Judge McCree

[489 F.2d 1207 (1973)]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-2012

THE CHEMEHUEVI TRIBE OF INDIANS *et al.*, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

ARIZONA PUBLIC SERVICE COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, UTAH POWER & LIGHT COMPANY, DEPARTMENT OF WATER & POWER OF THE CITY OF LOS ANGELES, EL PASO ELECTRIC COMPANY, NEVADA POWER COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY, INTERVENORS

Petition for Review of Orders of the Federal Power Commission

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[1208] Decided November 9, 1973

Joseph J. Brecher, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, for petitioners, *Reid Chambers* and *Edward Berlin* also entered appearances for petitioners.

Daniel Goldstein, Assistant General Counsel, Federal Power Commission, with whom *Gordon Gooch*, General

Counsel, *Leo E. Forquer*, Solicitor, and *George W. McHenry, Jr.*, First Assistant Solicitor, Federal Power Commission, were on the brief, for respondent. *J. Richard Tuano*, Deputy Solicitor, Federal Power Commission, at the time the record was filed, also entered an appearance for respondent.

Harry A. Poth, Jr., with whom *Richard M. Merriman*, *Peyton G. Bowman, III*, and *Robert T. Hall, III* were on the brief, for intervenor Arizona Public Service Company and certain other intervenors.

Edward P. Nelsen and *Robert W. Tollen* were on the brief for intervenor San Diego Gas & Electric Company.

Sidney G. Baucom and *Robert Gordon* entered appearances for intervenor Utah Power & Light Company.

Edward C. Farrell entered an appearance for intervenor Department of Water & Power of the City of Los Angeles.

William Duncan entered an appearance for intervenor El Paso Electric Company.

Samuel P. Cowley entered an appearance for intervenor Nevada Power Company.

Leroy Michael entered an appearance for intervenor Salt River Project Agricultural Improvement & Power District.

John R. Bury entered an appearance for intervenor Southern California Edison Company.

Before WRIGHT, TAMM and MCCREE,* *Circuit Judges*.

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* Of the Sixth Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a) (1970).

Opinion for the court filed by *Circuit Judge* McCree.

McCree, *Circuit Judge:* Thermal electric power plants, or "steam plants," whether fossil-fueled or nuclear-fired, require large amounts of water to cool and thereby condense the steam after it passes through turbine rotors. In this appeal, we must decide whether fossil-fueled steam plants that obtain their cooling waters from a major river system of the United States in a manner affecting its navigability are subject to the licensing jurisdiction of the Federal Power Commission (FPC) under Part I of the Federal Power Act, 16 U.S.C. §§ 791a-823 (1970).

Petitioners contend that the FPC has authority to license these plants; the Commission asserts, as it has since 1921, that it does not.

[1209] Petitioners [1] filed with the FPC on September 10, 1971,

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[1] Complainants Chemehuevi Tribe and Cocopah Tribe of Indians live on reservations along the Colorado River and assert an interest in the quality and quantity of the river waters. The Chemehuevi Tribe also claims it is threatened by air pollution from some of the plants in question. Complainant Sierra Club is a national organization interested in the conservation of unspoiled, wild, and scenic areas of the United States, and it claims that its particular interest in protecting the "unparalleled scenic and recreational attractions of the Southwestern United States" would be affected by the activities of the power plants. Complainant Committee to Save Black Mesa, Inc. is a nonprofit organization headquartered on the Navajo Indian reservation in Arizona that disseminates information regarding the consequences of power plants or mining activities near the reservation and is composed of persons residing on the reservation whose health, welfare, and esthetic enjoyment of the area allegedly will be adversely affected by the activities of the power plants in question. Complainants Emma Yazzie, Jimmy Yazzie, Paul Begay, Chester Hugh Benally, and Bill Begay are Navajo Indians residing on a reservation near the Four Corners

a complaint and petition for an order to show cause[2] requesting the Commission to require ten public utilities located in the southwestern United States[3] (in the so-called Four Corners area) to obtain licenses for six fossil fueled plants being constructed along the Colorado River and its tributaries. The complaint asserted that the plants are part of a vast power pool being created in the southwestern United States by the utilities and that the energy generated within the pool will be transmitted in interstate commerce to load centers as far as 600 miles away. The six plants described in the complaint are: 1) the Four Corners Plant, located on the Navajo Indian Reservation near Farmington, New Mexico, which has five coal-fired generating units in commercial operation, a current installed capacity of 2,087 megawatts, and a proposed total capacity of about 6,000 megawatts,[4] and according to the complaint, withdraws about 34,000 acre feet of water per year from the San Juan River;[5] 2) the Mohave Plant, on the Colorado River three miles downstream from the Davis Dam in the southeast corner

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power plant, who claim that their health and welfare is severely threatened by the activities of that plant and the other plants.

[2] See 18 C.F.R. §§ 1.6(a), (d) (1972).

[3] The utilities are the Arizona Public Service Company, Southern California Edison Company, Public Service Company of New Mexico, Salt River Project, Tucson Gas & Electric Company, El Paso Electric Company, Los Angeles Department of Water & Power, Nevada Power Company, Utah Power & Light Company, and San Diego Gas & Electric Company.

[4] The sources of these figures are the complaint and the intervenor brief, in this court, of eight of the named utilities.

[5] An acre foot of water is the amount required to cover one acre of land with one foot of water.

of Nevada, with two 750,000-kilowatt coal-fired units in commercial operation, which withdraws 30,000 acre feet of water per year from the Colorado River; 3) the Navajo Plant, under construction on the Navajo Indian Reservation four miles east of Page, Arizona, in the extreme north of Arizona, which will have three 770,000-kilowatt coal-fired units in commercial operation by the spring of 1976, and will withdraw 34,100 acre feet of water per year from Lake Powell, the reservoir created by the Glen Canyon Dam on the Colorado River in northern Arizona and southern Utah; 4) the Kaiparowits Plant to be constructed on federally owned land in southern Utah about 20 miles north of Page, Arizona, with initial planned installed capacity of 2,000 megawatts and possible ultimate capacity of 6,000 megawatts, which will withdraw 102,000 acre feet of water per year from Lake Powell; 5) the San Juan Plant, under construction on federal land near Farmington, New Mexico, with planned initial capacity of 330,000 kilowatts and possible ultimate capacity of 990,000 kilowatts, which is scheduled to begin operation in the summer of this year and will withdraw 20,200 acre feet of water per year from the San Juan River; 6) the Huntington Canyon Plant, being constructed in part on federal land about 29 miles from Price, Utah, which will consist initially of one coal-fired unit of 430,000 kilowatts and will begin operation in 1974, with a second unit planned for 1977 and possibly two additional units thereafter, for a total possible ca-
[1210] pacity of 2,000 megawatts, and will withdraw 30,000 acre feet of water per year from Huntington Creek for use with the initial generating unit.

The complaint asserted that the Commission has licensing authority over the Four Corners plants under § 4(e) of the Federal Power Act, 16 U.S.C. § 797(e) (1970),[6]

[6] 16 U.S.C. § 797(e) (1970) provides, in pertinent part:

[Footnote continued on page 43a]

because the utilities are constructing and operating "project works," *see* 16 U.S.C. §§ 796(11), (12) (1970),[7]

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[6] [Continued]

The commission is authorized and empowered—

. . .

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided:

[7] 16 U.S.C. §§ 796(11), 796(12) (1970) provide:

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dam and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and

for the development, transmission, and utilization of electric power across and along "navigable waters," *see* 16 U.S.C. § 796(8) (1970);[8] that the above-described withdrawals of water from the Colorado River system by the six power plants will affect the navigability of these navigable waters; that the Navajo and Kaiparowitz plants will use "surplus water," *see* 16 U.S.C. § 797(e) (1970),[9] impounded by a "government dam," *see* 16 U.S.C. § 796(10) (1970);[10] and that some of the six plants are or will be located on public lands or reserva-

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occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) "project works" means the physical structures of a project. . . .

[8] 16 U.S.C. § 796(8) (1970) provides:

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority; . . .

[9] *See* note 6 *supra*.

[10] 16 U.S.C. § 796(10) (1970) provides:

(10) "Government dam" means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from other . . .

tions of the United States, *see* 16 U.S.C. §§ 796(1), 796
[1211] (2).[11] After alleging that the six plants are likely to create severe air and water pollution, threaten the integrity of many natural, historical, and recreational resources, and disrupt the ecology and despoil the environment of the Four Corners region, the complaint stated that only a "single legal issue" was presented: "does the Federal Power Commission have licensing jurisdiction over steam plants generating and transmitting energy in interstate commerce, which withdraw large quantities of water from navigable streams for cooling and other plant purposes?" Because the plants were under construction and because only a question of law was involved, petitioners requested an expedited procedure and requested the FPC to order the utilities to show cause why they should not be required to suspend all development and construction of the plants pending the conclusion of this proceeding.

On their request, the utilities, were given until November 9, 1971, to file answers to the complaint. On October 18, 1971, the Utah Power & Light Company filed an answer denying most of the allegations of the complaint and moved to dismiss the complaint for failure to state a claim upon which relief could be granted, for

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[11] 16 U.S.C. §§ 796(1), 796(2) (1970) provide:

> (1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall include "reservations", as hereinafter defined;
>
> (2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks; . . .

lack of subject matter jurisdiction, and for laches with respect to the Huntington Canyon Plant. Before any other answers were filed, however, the Commission on November 4, 1971, *sua sponte* issued an order dismissing the complaint for lack of jurisdiction.

In its order, the Commission stated that its licensing authority under Part I of the Federal Power Act extended to the licensing of "project works" and that thermal electric generating plants are not "properly classifiable" as project works within the meaning of 16 U.S.C. §§ 796(11), (12) (1970). This conclusion was based on brief references to the preamble of the Act as originally enacted in 1920, to the legislative history of the Act, to the long-standing FPC interpretation of its powers under the Act, and to the decision of the Supreme Court in *Federal Power Commission* v. *Union Electric Company*, 381 U.S. 90, 110 (1965) (the *Taum Sauk* case), all of which support the determination that the Commission has licensing authority over hydroelectric plants only, *i.e.*, plants generating electricity by water power.

On November 10, 1971, complainants filed an application for rehearing, pursuant to 16 U.S.C. § 825*l*(a) (1970). The application asserted that the structures and operations of the six plants came within the literal language of 16 U.S.C. § 797(e) (1970), because

> [t]he facts in this case demonstrate clearly that water conduits, power houses and transmission lines have been and are being constructed for the purpose of generating and transmitting electricity in interstate commerce; that surplus water from behind the Bureau of Reclamation's Glen Canyon Dam will be utilized for this purpose; and that much of the facilities in question will be and are located on public lands and reservations of the United States.

In addition, the application contended that consistent administrative failure to regulate was not conclusive of the jurisdictional issue because "consistent error is still error," *Phillips Petroleum Company v. Wisconsin*, 347 U.S. 672, 678 n.5 (1954), and that the lack of explicit jurisdictional authority in an agency's enabling statute does not preclude the agency from exercising jurisdiction when appropriate to the performance of the agency's function, *United States v. Southwestern Cable Company*, 392 U.S. 157 (1968). Finally, the application suggested that the statements in the *Taum Sauk* case about the
[1212] lack of FPC jurisdiction to regulate steam plants were obiter dictum and thus not determinative of a subsequent proceeding squarely presenting the issue.

On December 10, 1971, the FPC issued an order denying the application for rehearing. Complainants then filed a petition in this court on December 14, 1971, to review the Commission's orders. *See* 16 U.S.C. § 825*l* (b) (1970).[12] By order dated February 4, 1972, the

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[12] Under 16 U.S.C. § 825*l* (b) (1970), "[a]ny party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the . . . United States Court of Appeals for the District of Columbia . . . ." Although it makes no practical difference in the result in this case, we observe that complainant Sierra Club does not have standing to seek review of the Commission's orders in this court because it has not satisfied the "injury in fact" test enunciated in *Sierra Club v. Morton*, 405 U.S. 727 (1972). Here, as in *Sierra Club*, the club

> failed to allege that it or its members would be affected in any of their activities or pastimes by the [Four Corners] development. Nowhere in the pleadings . . . did the Club state that its members use [the Colorado River system and the surrounding area] for any purpose, much less that they use it in any way that would be

utilities named in the complaint were allowed to intervene in these proceedings.

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significantly affected by the proposed actions of the respondents.

405 U.S. at 735. It is true that the decision in *Sierra Club* construed § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), which is not involved in this case. However, the language of § 313(b) of the Federal Power Act is identical to that of § 10 of the Administrative Procedure Act—both refer to a "party" who is "aggrieved" by agency action, *see Citizens Comm. for Hudson Valley v. Volpe*, 425 F.2d 97, 101 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970)—and the opinion in *Sierra Club* discussed cases arising under other judicial review statutes interchangeably with those involving only the Administrative Procedure Act. *See* 405 U.S. at 736-40 & n.14.

It is interesting to observe that 18 C.F.R. § 1.6(a) (1972) allows the filing of a complaint with the FPC by "[a]ny person . . . complaining of anything done or omitted to be done by any . . . public utility . . . in contravention of an act . . . administered" by the Commission. Thus, the Sierra Club had standing to initiate the licensing proceeding before the Commission, and it can be argued that this made it a "party" that was aggrieved when the FPC dismissed the complaint. However, the fact that a person is a party in agency proceedings does not require that he be allowed to seek judicial review of the agency's action; he must still satisfy judicial standing requirements. *See Pittsburgh & West Virginia Ry. Co. v. United States*, 281 U.S. 479, 486 (1930); 3 K. Davis, *Administrative Law Treatise* 241 (1958); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 728, 767 (1968). *But cf. Office of Communication of United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 359 F.2d 994, 1000 n.8 (1965).

I

At the outset, it is important to consider briefly the factual background of the problems presented by the issues in this case.

Although estimates of the precise rate of growth vary, it is undisputed that the demand for electric power—as well, of course, as that for other kinds of energy—is increasing at a staggering rate. According to one source,[13] consumption of electric power is growing by 9% per year, and demand for it is expected to double during each of the next two or three decades. The expected 250% increase in the demand for electric energy between 1970 and 1990 will require at least 255 new thermal-electric plants of 500,000 kilowatts to 2,000 megawatts capacity.[14] Ninety-one of these plants will be
[1213] fossil-fueled; 164 will be nuclear-fired.[15] Hydroelectric plants are not expected to play more than a very minor role in satisfying this burgeoning demand for electric power both because most of the good hydroelectric sites are being fully utilized and because thermal-electric plants

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[13] N. Fabricant & R. Hallman, *Toward a Rational Power Policy: Energy, Politics, and Pollution* 5 (1971). *See also* Ramey & Murray, *Delays and Bottlenecks in the Licensing Process Affecting Utilities: The Role of Improved Procedures and Advance Planning*, 1970 Duke L.J. 25, 31-32; Tarlock, Tippy & Francis, *Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions*, 45 S. Cal. L. Rev. 502 (1972); Comment, *Thermal Electric Power and Water Pollution: A Siting Approach*, 46 Ind. L.J. 61, 63 (1970).

[14] *See* Ramey & Murray, *supra* note 13, at 32 n.31, citing Energy Policy Staff, Office of Science and Technology, *Considerations Affecting Steam Power Plant Site Selection* 4 (1968); Smith, *Electricity and the Environment—The Generating Plant Siting Problem*, 26 Bus. Law. 169 (1970).

[15] *See* Ramey & Murray, *supra* note 13, at 34.

are more effective in producing the great quantities of electricity required.[16]

The manner in which thermal-electric plants generate electricity has been simply described as follows:

> Steam electric plants generate electricity by the thermo-dynamic process known as the Rankine Cycle. Heat produced by burning fossil fuel or nuclear materials turns water into steam. The steam passes through a turbine at high pressure and temperature, turning the turbine which in turn drives a generator to produce electricity. After leaving the turbine, the steam goes into a condenser, where the steam gives off its excess heat to the cooling water circulating in the condenser, is condensed to water and returned to the boiler or reactor to repeat the cycle.[17]

About two-thirds of the heat generated by burning the fuel source becomes waste heat that is absorbed by the cooling waters in the condenser,[18] and this results in a considerable elevation of the temperature of these waters. The heated water is then ordinarily returned directly to the water body from where it had been pumped into the condenser. This "once-through" cooling process for thermal-electric plants accounts for over 80% of the total cooling-water used nationally and almost one-third of the total water used for all purposes.[19] The tremendous projected growth in the production of thermal-electric power is expected to increase cooling requirements from 120 billion gallons a day in 1971, about 10% of the average daily runoff in the continental United States, to 200

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[16] *Id.* at 32; *see* FPC, *National Power Survey* 93 (1964).

[17] N. Fabricant & R. Hallman, *supra* note 13, at 73; *see* Comment, *supra* note 13, at 65.

[18] N. Fabricant & R. Hallman, *supra* note 13, at 52.

[19] *Id.*

billion gallons a day by 1980 and to 600 billion gallons a day by 2000, an amount equivalent to 50% of the average daily runoff in the United States.[20]

When the cooling waters are discharged directly into receiving water without having passed through cooling towers,[21] they may be 10 to 20 degrees (Fahrenheit) warmer than the receiving water.[22] Thermal discharges can cause severe damage to the aquatic ecosystems of the receiving waters.[23] If evaporative cooling towers are used to cool the waters leaving the condensers, the immediate environment may be adversely affected and large quantities of water may be permanently lost to the water source from which the cooling waters were obtained.[24]

[1214] In addition, fossil-fueled steam plants are notorious sources of air pollution. Nationally, they contribute about 50% of all sulfur oxides, 25% of all nitrogen oxides, and 25% of all particulate matter discharged into the at-

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[20] *Id.* at 52-53. Apart from the increase in the number of plants, much of this dramatic rise in cooling water requirements can be explained by the anticipated proliferation of nuclear-fired plants, which under present technology produce about 50% more heat than do fossil-fueled plants. *See id.* at 6, 53; Tarlock, Tippy & Francis, *supra* note 13, at 508; Comment, *supra* note 13, at 63-64.

[21] For a description of the operations of cooling towers, see Comment, *supra* note 13, at 71 n.25. Alternatives to direct heat discharge are discussed in *id.* at 71-72 n.25, and Tarlock, Tippy & Francis, *supra* note 13, at 509-10.

[22] N. Fabricant & R. Hallman, *supra* note 13, at 52.

[23] *See id.* at 53-55; Tarlock, Tippy & Francis, *supra* note 13, at 508-09; Comment, *supra* note 13, at 65-70.

[24] *See* Comment, *supra* note 13, at 71, n. 25.

mosphere.[5] Moreover, the construction and operation of these huge complexes, the erection of hundreds of miles of overhead transmission lines, and the utilization of dams, pumps, and pipes in and along adjacent waterbodies disrupt the areas surrounding power plants.

We are told by petitioners that the six plants involved in this appeal have already had a significant detrimental impact in the Four Corners region and that this impact can be expected to become much more pervasive as all six plants become operational and plant capacity is increased. The environmental impact statement prepared by the Federal Bureau of Reclamation for the Navajo Project,[6] petitioners say, indicates that the six plants will evaporate most of the water they withdraw for cooling purposes. Thus, up to a quarter million acre feet of water would annually be withdrawn permanently from the Colorado River system, or over 2% of the 10-year average flow of the Colorado River at Lee Ferry, Arizona, of 12.1 million acre feet of water per year for the period 1958-67.[7] Petitioners claim that the projected increase in electric-power generation in the Colorado River basin will increase the permanent withdrawal to 5% by 1990. Petitioners also contend that studies and hearings by various state and federal officials have confirmed the

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[5] *See* N. Fabricant & R. Hallman, *supra* note 13, at 15; Tarlock, Tippy & Francis, *supra* note 13, at 510-12.

[6] *See* 42 U.S.C. § 4332(2)(C) (1970).

[7] *See* H.R. Rep. No. 1312, 90th Cong., 2d Sess. (1968), in 3 U.S. Code Cong. & Ad. News 3666, 3683-84 (1968). The average flow from 1891 to 1967 was 11 million acre feet, with a high of 24 million acre feet in 1917 and a low of 5.6 million acre feet in 1934. *Id.* By 1967 the Colorado River was already "over-committed" by contract, compact, and judicial decree, according to the House Committee on Interior and Insular Affairs. *Id.* at 3669-70.

assertions of area residents that the Four Corners plants are heavily polluting the air of the region in violation of state and federal standards and that other activities harmful to the environment including strip mining are being undertaken in conjunction with operating the plants.[28]

It is thus in the context of an increasing competition between the need for power and the importance of preserving public resources, between virtually unregulated growth and constraints required by concern for present-day and long-term environmental consequences, that we construe a statute that was enacted in an age in which the magnitude of these conflicts could not have been foreseen.

II

Petitioners contend that FPC jurisdiction is properly invoked under § 4(e) of the Federal Power Act for two reasons: either because the six plants identified in the complaint are "project works" necessary for the development of power along navigable waters or because the plants will utilize "surplus water" from Government dams. We will consider these contentions in turn.

A

It is true, as petitioners point out, that the literal language of § 4(e) appears to include steam plants. "Project," as defined in 16 U.S.C. § 796(11), means the complete unit of development of a power plant, including reservoirs and dams, and is not by its terms limited to hydroelectric plants. Under § 4(e), the Commission is empowered to license "project works"—the physical structures of a project—necessary or convenient for the "de-

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[28] *See, e.g.*, Sen. Comm. on Interior & Insular Affairs, 92d Cong., 1st Sess., *Problems of Electrical Power Production in the Southwest* (Comm. Print 1971); Comment, *The Four Corners Power Complex: Pollution on the Reservation*, 47 Ind. L.J. 704, 705-08 (1972).

velopment, transmission, and utilization of power across, along, from or in" waterways over which Congress has jurisdiction. Again, there is no mention of "hydroelectric power" as such. Under the "ordinary man" or "plain meaning" cannon of statutory construction, petitioners argue,[8] the utilities here are constructing facilities described by the Act, and there is, accordingly, no need to resort to legislative history or other extrinsic aids.[9]

In answering a similar argument, the Second Circuit has said:

> We reject this line of maxims of statutory construction in favor of Judge Learned Hand's more practical instruction that "[w]ords are not pebbles in alien juxtaposition," [*NLRB v. Federbush Co., Inc.*, 121 F.2d 954, 957 (2d Cir. 1941)] and therefore turn first to [the Act's] legislative history.[10]

Our role is to give effect to the intention of Congress as it may be discerned by reference to the historical background of the legislation as well as to the particular words chosen by the Congress to express its purpose.[11] The use of extrinsic aids such as legislative history to determine congressional purpose is appropriate not only when the words of the statute are ambiguous but also "when the literal words would bring about an end com-

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[8] *See, e.g., Malat* v. *Riddell*, 383 U.S. 569, 571 (1966); *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618 (1943).

[9] *See, e.g., United States v. Oregon*, 366 U.S. 643, 648 (1961); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947); *Calvert Cliffs' Coordinating Comm. v. United States AEC*, 449 F.2d 1109, 1126 (D.C. Cir. 1971).

[10] *Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686, 689 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971).

[11] *See, e.g., FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 126 (1960) (Black, J., dissenting).

pletely at variance with the purpose of the statute."[33] In our case, the history of the Federal Power Act, other provisions of the Act, developments occurring after its enactment, and the uniform (with one notable exception) expression of judicial and scholarly commentators compel the conclusion that the structures comprising thermal-electric plants are not "project works" required to be licensed by the FPC under § 4(e).

Part I of the Federal Power Act was enacted originally as the Federal Water Power Act in 1920.[34] It was the first federal legislation to provide for comprehensive management of the nation's waterways, and it was also the first federal attempt to regulate significantly the production of power.

The earliest federal efforts, which culminated in the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403
[1216] (1970),[35] were aimed at preventing obstruction of nav-

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[33] *United States v. Public Utilities Comm'n of Calif.*, 345 U.S. 295, 315 (1953); *cf. Preiser v. Rodriguez*, 411 U.S. 475, 488-491 (1973).

[34] A colorful and detailed account of the events preceding its passage is contained in J. Kerwin, *Federal Water-Power Legislation* (1926). *See also* Fly, *The Role of the Federal Government in the Conservation and Utilization of Water Resources*, 86 U. Pa. L. Rev. 274 (1938); Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 Geo. Wash. L. Rev. 9 (1945); Comment, 39 Mich. L. Rev. 976 (1941).

[35] 33 U.S.C. §§ 401, 403 (1970) provide:

§ 401. Construction of bridges, causeways, dams or dikes generally

It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same

igable waterways. To achieve this end, the Act of 1899 requires the approval of Congress, the Secretary of the Army, and the Chief of Engineers before any dam, bridge or similar facility can be constructed in navigable waters of the United States, and prohibits the obstruc-

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shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

§ 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

tion of these waters even by activities undertaken only on nonnavigable tributaries.[36] A parallel course of legislation granted rights of way over public lands for purposes of irrigation and the generation of electric power,[37] and in 1901 authorized the Secretary of Interior to grant revocable permits for "electrical plants, poles and lines for the generation and distribution of electrical power" on rights of way through the public lands and forests of the United States.[38] In practice, however, the Secretary did not bother to issue formal permits, and hydroelectric generating structures were routinely erected on public lands or along navigable waters. Bills awarding power sites were routinely introduced in Congress and routinely approved.[39] The notable exception was President Roosevelt's veto[40] of a bill that would have awarded Muscle Shoals, Alabama—which later became the nucleus of the Tennessee Valley Authority system—to private interests.[41]

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[36] Earlier legislation included the Rivers and Harbors Acts of 1880 (21 Stat. 197), 1884 (23 Stat. 133), 1888 (25 Stat. 424-25), 1890, (26 Stat. 426, 454), and 1892 (27 Stat. 110). *See* Starr, *Navigable Waters of the United States—State and National Control*, 35 Harv. L. Rev. 154, 171 (1921); Kerwin, *supra* note 34, at 105-08; *See FPC v. Union Electric Co.*, 381 U.S. 90, 99 (1965); *Union Bridge Co. v. United States*, 204 U.S. 364 (1907); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

[37] Act of March 3, 1891, ch. 561, § 18, 26 Stat. 1101, *as amended*, 43 U.S.C. § 946 (1970); Act of May 14, 1896, ch. 179, 29 Stat. 120, *as amended*, 43 U.S.C. § 957 (1970). *See generally* Kerwin, *supra* note 34, at 105-08.

[38] Act of Feb. 15, 1901, ch. 372, 31 Stat. 790, *as amended*, 43 U.S.C. § 959 (1970). This legislation superseded the legislation of 1896 (*see* note 37 and accompanying text). *Utah Power & Light Co. v. United States*, 243 U.S. 389, 407 (1917).

[39] Pinchot, *supra* note 34, at 11.

[40] *See* 36 Cong. Rec. 3071 (1903).

[41] *See* Pinchot, *supra* note 34, at 11; *see generally* Kerwin, *supra* note 34, at 58-110.

It should be observed at this point that hydroelectric power became a major power source in the United States about the turn of the 20th century because of the development of technology for the long-distance transmission of electricity. Before that time, steam power had become
[1217] the chief source of power in the United States,[7] and has remained so to the present day.[8] The development of commercially feasible techniques for the production of electricity in the 1870's, and the establishment of the first large-scale electric generating plants in the 1880's, did not inaugurate a rapid expansion of the electric power industry because the transmission of power by direct current was too inefficient over long distances. However, with the development of alternating current in the late 19th century, the problem of power loss over long distances was solved, and hydroelectric power sites on major rivers or public lands distant from large cities became common.[9] It was the escalating private appropriation of these sites that evoked the early federal regulatory initiatives.

Following the transfer of responsibility for the national forests to the Forest Service of the Department of Agriculture in 1905,[10] the Secretary of Agriculture began to

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[7] *See* Kerwin, *supra* note 31 at 13-57; Pinchot, *supra* note 31, at 9; *see also* note 121 *infra*.

[8] In *Udall v. FPC*, 387 U.S. 428, 445-47 n.11 (1967), the Court indicated that in 1960, hydroelectric power accounted for 3.9% of the energy requirements of the United States, nuclear power, 0.1%, and fossil fuels, 96%. By the year 2000, hydroelectric power is expected to provide only about 2% of our energy, nuclear power from 14% to 23%, and fossil fuels from 75% to 84%. *Id.* By 1990, nuclear plants will provide about one-fourth of our electric power. Comment, *supra* note 13, at 61 n.6. *See* note 130 *infra*.

[9] *See* Kerwin, *supra* note 31, ch. 1; 1 FPC, *National Power Survey* chs. 1, 2, 4, & 6 (1964).

[10] Act of Feb. 1, 1905, ch. 288, 33 Stat. 628, codified in 16 U.S.C. § 472 (1970).

issue permits for 50-year periods for rights of way in the forests for the generation and transmission of water power. A fee system was also established,[45] although the charges at first were hardly more than nominal. Nevertheless, permits were still granted as a matter of course, and power sites were still routinely awarded by Congress to private power interests. And no efforts were made to coordinate the many different uses of public lands and navigable waters for the purpose of promoting the comprehensive development of the major river systems in the public interest.

Beginning in 1906, the first halting steps in that direction were taken. The General Dam Act[46] of that year provided that, when Government permission was granted to construct a dam for water power or any other purpose in any navigable waters, the plans and specifications for the dam and "all accessory works" had to be submitted to the Secretary of War and the Chief of Engineers for approval. These two officials were expressly authorized to impose conditions on construction that were deemed necessary to protect the present and future interests of the United States, including the condition that the permittees construct structures "necessary in the interests of navigation." The Act was intended by its framers to permit the development of water power while facilitating the improvement of stream navigability by the Government through the utilization of private capital."[47]

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[45] *See United States v. Colorado Power Co.*, 240 F. 217 (D. Colo. 1916); Kerwin, *supra* note 34, at 77-78, 143-53; Pinchot, *supra* note 34, at 11-15.

[46] Act of June 21, 1906, ch. 3508, 34 Stat. 386.

[47] *See* Kerwin, *supra* note 34, at 113.

[1218] In 1910, the Act was amended [*] to provide that in acting on the plans submitted, the two above-named federal officials "shall consider the bearing of said struc-

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[*] Act of June 23, 1910, ch. 360, 36 Stat. 593. The Act in its amended form can be found in 33 U.S.C.A. at pp. 25-27. The amendment was inspired by President Roosevelt's vetoes of the Rainy River bill in 1908 (42 Cong. Rec. 1698 (1909)) and the James River bill in 1909 (43 Cong. Rec. 978 (1909)) for the stated reasons, *inter alia*, that no charges or time limits had been set for these awards of permits for water power development in the named rivers. *See* Kerwin, *supra* note 34, at 115-30; Pinchot, *supra* note 34, at 16-17. In *FPC v. Union Electric Co.*, 381 U.S. 90, 98-99 n.11 (1965), the Court referred to the Rainy River veto as the "keynote" of "movement toward the enactment of" the federal Water Power Act of 1920, and it quoted the following passage from the President's veto message:

> "We are now at the beginning of great development in water power. Its use through electrical transmission is entering more and more largely into every element of the daily life of the people. Already the evils of monopoly are becoming manifest; already the experience of the past shows the necessity of caution in making unrestricted grants of this great power.
>
> "It should also be the duty of some designated official to see to it that in approving the plans the maximum development of the navigation and power is assured, or at least that in making the plans these may not be so developed as ultimately to interfere with the better utilization of the water or complete development of the power."

Besides the 1910 amendment to the General Dam Act, the vetoes may have also inspired passage of the Act of 1911, 36 Stat. 1253, that authorized the Secretary of Agriculture to grant 50-year easements over public lands, forests, and reservations for electrical poles and lines. *See* Kerwin, *supra* note 34, at 169. *Cf. United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206, 213 (1943). The presidential vetoes were themselves anticipated by the President's appointment of the Inland Waterways Commission in 1908 (S. Doc. No. 325, 60th Cong., 1st Sess. (1908)) to generate a comprehensive plan "designed for the benefit of the entire country. Such a plan

ture upon a comprehensive plan for the improvement of the waterway over which it is to be constructed with a view to the promotion of its navigable quality and for the full development of water power . . . ." The 1910 amendment also provided that the assessment of charges by the United States reflect the cost of maintaining the navigability of the affected river systems. Moreover, permits granted under the Act were made revocable and could not be granted for a period exceeding 50 years. At the expiration of the permit, the Government would pay the permittees the reasonable value of the dams and appurtenant works.

Despite these initiatives, however, the focus of federal efforts over the next few years remained on improving and maintaining the navigability of the major rivers. Thus, for example, the Weeks Act of 1911 authorized the Secretary of Agriculture to acquire, upon recommendation of the National Forest Reservation Commission, denuded lands in the watersheds of headwaters of navigable waters to protect the navigability of those waters by making the lands available for reforestation.[9] The Government also engaged in sporadic efforts to impose the permit requirements of the 1901 legislation on power companies that had appropriated public lands for the building of hydroelectric facilities without seeking a fed-

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should consider and include all the uses to which streams should be put, and should bring together and coordinate the points of view of all users of waters." 42 Cong. Rec. 6968 (1908).

[8] 36 Stat. 961, codified in 16 U.S.C. §§ 480, 500, 513-19, 521, 552, 563 (1970).

[9] *See Young* v. *Anderson*, 160 F.2d 225 (D.C. Cir.), *cert. denied*, 331 U.S. 821 (1947); *United States* v. *Griffin*, 58 F.2d 674 (W.D. Va. 1932).

eral license,[52] and to require the payment of fees as a condition to retaining licenses previously issued.[53]

A congressional battle between private power interests and conservationists was touched off by the attempt of the former in July, 1912, to secure House of Representatives' approval of an Omnibus Water Bill that would have authorized the construction of seventeen major dam projects with no provision for a charge or other regula-
[1219] tion by the Government.[54] The bill was eventually de-

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[52] *See Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917).

[53] *See United States v. Colorado Power Co.*, 240 F. 217 (D. Colo. 1916). By 1915, the Government was collecting about $89,000 in administrative charges assessed for development of water power on the national forests. *See* Kerwin, *supra* note 34, at 202.

[54] *See* H.R. Rep. 1050, 62d Cong., 2d Sess. (1912). The conservationists, led by men such as Gifford Pinchot, head of the Forest Service under President Roosevelt and later Governor of Pennsylvania, decried what they saw as a great giveaway of the Nation's water resources to private interests and a callous disregard of the interest of the public in a comprehensive system of water management that would benefit the public at large. *See* Pinchot, *supra* note 34, at 11-20. Pinchot referred to private interests as "water power grabbers" (*id.* at 16) who were "eager for plunder," (*id.* at 18) and he characterized the battle as one "between private greed and the public good" (*id.*). *See generally* Kerwin, *supra* note 34, *passim;* Fly, *supra* note 34, at 291-92. These conservationists were concerned about the growing use of fossil fuels in the generation of other types of power, and they desired to encourage the growth of water power, under federal auspices, because of their perception of hydroelectricity as a virtually limitless—and cheap—source of power. Caught up as well in the rising public tide against private monopolization of the means of production, they sought to protect the right of the public to the power potential of water. As the House Report accompanying the Adamson Bill (*see* note 61 *infra*) put it:

[Footnote continued on page 63]

railed by President Taft's veto of the Coosa River bill on August 24, 1912, because the latter contained no provision for charging the permittee for the privilege of

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[Continued]

> Experience has taught us that in the past the private monopolization of natural opportunities has not only deprived the general public of their natural right to a proper share of the benefit which should accrue from them, but such monopolization has given to those possessing it a preponderance [*sic*] of influence and of power in our industrial and civic life which is little short of a menace to our institutions.
>
> We have awakened none too soon to the necessity of preserving under public control these great natural opportunities for the creation of wealth, which belong to the public and which could constitute a serious source of danger to equal liberty and fair opportunity if transferred in perpetuity to private ownership.

H.R. Rep. No. 842, 63d Cong., 2d Sess. 11 (1914).

The opponents of the conservationists were those who believed that only the private development of the nation's water power resources could exploit those resources to a degree that would benefit the public, those who were against increasing centralization of government or increasing federal intervention in what they perceived to be essentially local or private affairs, and, of course, those who saw the private, unregulated generation of hydroelectric power as a profitable enterprise. *See* Kerwin, *supra* note 34, at 153-57 *passim;* Fly, *supra* note 43, at 289-90. Both groups agreed, however, that the existing system of federal regulation was undesirable because of its piecemeal approach and its generally restrictive effect on the large-scale development of water power.

The Dam Acts of 1906 and 1910 were considered inadequate by many because, although they did provide for charges, no fees were exacted for the privilege of obstructing navigable waters; permittees were merely required to compensate the Government for the costs of restoring prior conditions of navigability and for benefits provided by Government improvements. And, investment under the Acts was seen to be a risky proposition because of uncertainty about the disposition of the properties after 50 years had expired and because Con-

building the dam. However, the battle lines had been drawn.[33] In all the legislative debates that followed, the primary line of demarcation between the opposing forces was this question of imposing charges on private developers of water power for being allowed to undertake such development. The power interests, whose main influence lay in the Senate, argued that the federal government could not constitutionally charge a private developer for the privilege of generating water power on a navigable waterway if the United States had no in-
[1220] terest in the surrounding lands and had made no expenditure itself for improvements at the development site. The conservationists, represented primarily in the House, countered with the argument that Congress could impose conditions on any grant of authority by it to obstruct navigable waters, and, since the Government could itself generate and sell water power at works it

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gress reserved the right to repeal or modify the Act without liability. *See* Kerwin, *supra* note 31, at 130. Although water power development on navigable streams had come to a standstill by 1912, development on the public lands, especially in the West, actually exceeded demand during this period. *See id.* at 39-42, 155-56.

An interesting expression of the point of view of the power interests can be found in Brown, *The Conservation of Water-Powers*, 26 Harv. L. Rev. 601 (1913), in which the author takes the position that the best way to "conserve" the nation's water power resources is to encourage private water power development. *See id.* at 604. *See also* Shields, *The Federal Power Act*, 73 U. Pa. L. Rev. 112 (1924).

[33] 48 Cong. Rec. 11796 (1912); *see* S. Doc. No. 949, 62d Cong., 2d Sess. (1912).

[34] *See* Kerwin, *supra* note 34, at 130-42; Pinchot, *supra* note 34, at 17-18.

[35] *See* Kerwin, *supra* note 34, at 79-98, 171-260.

constructed to facilitate navigation,[58] it could license a private company to develop the power in its stead, and could exact a reasonable fee as compensation for the license.[59] For our purposes, it is interesting to observe that the proponents of charges pointed out that steam plants were more expensive to operate than water power plants, and that therefore if a state public service commission fixed a flat rate to be charged by electric utilities, the water power plants would make excess profits. They argued that a federal charge on hydroelectric plants could result in those excess profits being used for the development of navigation. Thus, the contemplated charge for the privilege of developing hydroelectric power was seen as a way of equalizing the costs of hydroelectric and steam power, and thereby insuring that the rates paid by consumers would be equal.[60] It was this view, of course, that eventually prevailed.

Over the next few years, several bills were introduced in Congress by the respective factions, but none was able to pass both houses.[61] However, in 1920, a Wilson

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[58] *See United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1908); notes 167-70 *infra* and accompanying text.

[59] *See* Kerwin, *supra* note 34, at 95-98.

[60] *See* 52 Cong. Rec. 10450 (1916); Kerwin, *supra* note 34, at 199-200.

[61] A number of bills reflected the key philosophical differences between the power interests and the conservationists, as they differed substantially on the questions of charges, Government recapture, and the extent of Government regulation of plant operations: The Adamson Bill, which related to water power development on navigable waters, H.R. 16053, 63d Cong. 2d Sess. (1914); the Ferris Bill, which was concerned with the question of water power development on the public lands, H.R. 16673, 63d Cong., 3d Sess. (1914); H.R.

administration bill regulating the construction of water power projects on navigable waters, public lands, and
[1221] forest reserves was introduced.[62] The recent war, and

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408, 64th Cong., 1st Sess. (1916); the Myers Bill, which was the response of the power interests to the original wording of the Ferris Bill, H.R. 16673, 63d Cong., 3d Sess. (1914); S. 2399, 65th Cong., 1st Sess. (1917); *see* Hearings before the Sen. Comm. on Public Lands on H.R. 16673, 63d Cong., 3d Sess. (1914); and the Shields bill, S. 3331, 64th Cong., 1st Sess. (1915); S. 1419, 65th Cong., 1st Sess. (1917). For a discussion of the bills and the legislative debates, *see* Kerwin, *supra* note 34, at 172-216. The water power interests lobbied very heavily for the Shields Bill, and much of their considerable influence during this period was a consequence of their press campaign for the need of immediate development of water power for the manufacture of nitrates necessary for ammunition for the impending war. But the Shields Bill, like the others, was never passed by more than one house. *See id.* at 207-10.

[62] In 1917, President Wilson had directed his Secretaries of War, Interior, and Agriculture to prepare a similar bill. The Bill, H.R. 8716, 65th Cong., 2d Sess. (1918), that was ultimately prepared and referred to a special House committee on water power contained most of the provisions of the bill that was finally enacted in 1920. The letter of transmittal accompanying certain amendments to the bill offered by the Secretaries reiterates many of the arguments that had been raised in favor of extensive federal water power regulation:

> WASHINGTON, FEBRUARY 27, 1918.
>
> Hon. T. W. Sims,
> House of Representatives.
>
> *Dear Mr. Sims:*
>
> It is understood your committee will take action at an early date upon various proposals which have been made concerning water-power legislation. On account of

the conditions now affecting the power industry and the need of maintaining our entire industrial machinery at its highest efficiency, a satisfactory solution of the water-power problem is, in our judgment, one of the most important steps for the consideration of this Congress and one which should receive attention at the earliest possible date.

The industrial expansion which has been necessary in order to produce the materials and equipment needed in the prosecution of the war has placed unprecedented demands upon the electric power industry, to such an extent in fact that the output of commercial central stations has increased more than 60 per cent since 1914. This increase has been greatest in the manufacturing sections of the East where water-power development is comparatively limited, and has been chiefly in the form of steam-generated power, because steam power can be developed more quickly and at less capital cost than water power. This increase in power output has taken place notwithstanding advances in costs of construction and of operation.

While the form of bill which has been presented for your consideration is directly concerned with water-power development only, an adequate solution of this problem will have a favorable and stabilizing effect upon the whole power industry. Probably no considerable increase in new water-power development can be expected immediately, but legislation is urgently needed in order to put existing water-power developments, which have been made under inadequate law, into a position of security which will enable them to make extensions and to meet maturing obligations upon favorable terms.

There is also need of legislation in order that time may be given to prepare for the developments that must take place after the close of the war, if the United States is to maintain its proper place in world trade, or even to supply its domestic needs. A survey of water-power resources is needed, particularly with relation to

specific districts and specific industries. The various establishments of the Federal Government which have had to do with the administration of water power should be coordinated through a single agency, and as far as practicable all agencies, federal, state, and private, should be brought into cooperation. It is urgently recommended that a federal power commission be established as provided in the proposed bill and be given ample authority to undertake this work of preliminary investigations.

Beyond the need of power development as such is the need of increasing the proportion of water power in order to reduce the drain on our coal and petroleum supplies, particularly the latter. Even if the coal supply were unlimited, the reduction in the demands upon labor and transportation equipment would be sufficient reason for substituting water power for steam power whenever possible. The petroleum supply particularly in the West where the greatest proportion is used for fuel, is being rapidly depleted, consumption has exceeded production and stocks in storage are fast disappearing. With the substitution of water power for steam power in central stations and with the electrification of railroads, a large part of the use of petroleum for fuel could be eliminated.

Water-power legislation should have in view not only the maintenance of the rights of the public in the national resources, but also the adequate protection of private capital by which such resources are developed. The bill before you aims to do both.

. . .

Very truly yours,

NEWTON D. BAKER,
Secretary of War.

FRANKLIN K. LANE,
Secretary of the Interior.

D. F. HOUSTON,
Secretary of Agriculture.

[Footnote continued on page 70]

what was seen as the inadequacy of the nation's exploitation of its resources in preparation for the war, gave additional impetus to the drive for effective water power regulation,[63] and, after compromise between the houses

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[62] [Continued]
Quoted in Kerwin, *supra* note 34, at 225-28 (emphasis added). However, after a vigorous debate over its recapture provisions and a House-oriented reconciliation of the bill with the Shields Bill in a conference committee, H.R. Rep. 1147, 65th Cong., 3d Sess. (1919), it fell victim to a Senate filibuster as the 65th Congress closed on March 5, 1919. *See* Kerwin, *supra* note 34, at 217-55; *see also FPC v. Union Electric Co.*, 381 U.S. 90, 102 n.18 (1965).

The bill was reintroduced in the House at the start of the next session, and it passed the House with minor changes in July 1919.

[63] Secretary Houston, in his report to the House, stated:

> The exigencies of war brought to light defects in our national utilization of power which had not been fully realized. Operating under statutes enacted when the electrical industry was in its infancy, we had permitted our vast water-power resources to remain almost untouched, turning to coal and oil as the main source of power; for steam power could be developed more quickly and easily with fewer legal restrictions and with greater security to the investment. Probably not less than 85 percent of the power used in this country for domestic, public, and industrial purposes and for the operation of railroads is produced from coal and fuel oil. Not only are water powers relatively unused, but we are yet far from accomplishing the economies which are practicable in the development of steam power. While individual steam stations have reached a high degree of mechanical efficiency, we have failed to realize the group efficiency of many stations operating in a system and we still pursue the crude method of transporting steam power by rail in its raw state as fuel instead of transmitting it over wires in its developed state as electrical energy.

> The power requirements of this country will not be met until we develop our water powers, tie them in with steam plants located at the mine itself and operate all in great interstate systems. These considerations were presented before the special committee of the House of Representatives in the hearings held on the water-power bill during the last Congress. The need of adequate legislation is no less urgent now.
>
> H. R. Rep. No. 61, 66th Cong., 1st Sess. 5 (1919).

See also the remarks of Senator Jones introducing the bill:

> If 10 years ago, instead of enacting restrictive laws which have prohibited development of our water powers, Congress had invited their development through fair and reasonable terms, the beginning of the World War would have found the United States with 20,000,000 developed hydroelectric power instead of 5,000,000. Indeed, it is not too much to say that Germany would have hesitated before entering the conflict with probability of having to face a Nation possessing such an enormous amount of harnessed physical force wherewith to back up its armies. As it was, the beginning of the Great War found us short of coal, short of oil, short of power, and half a billion dollars was expended inside of two years in the erection of steam-power plants, many of which, built haphazard under war-time stress, are now useless owing to unfavorable location. Through failure of Congress to pass water-power laws under which money could be safely invested with prospect of a full return, water powers now wasting have been held back from development in at least 22 States of the Union.
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> 59 Cong. Rec. 241 (1919)

There was also concern that the nation's river systems had proved inadequate to maintain wartime transportation burdens. *See* Fly, *supra* note 34, at 279. And, the old arguments about the efficiency and inexhaustibility of water power were also trotted out. *See* report of Secretary Houston, *supra*, and remarks of Senator Jones:

[Footnote continued on page 71a]

[1222] on questions relating to the amount of Government charges and the wording of the recapture provision,"

"[Continued]

The report of the Geological Survey shows that our consumption of coal for all purposes during the year 1913 was about 100,000,000 short tons, of which the railroads alone used about 30 per cent. This tremendous tonnage requires for mining and transportation the labor of 1,500,000 men and the use of over 1,000,000 freight cars and 40,000 locomotives. In addition to this the petroleum used in 1913 was equivalent to 24,000,000 tons of coal. Every water horsepower now going to waste which could be economically substituted for fuel power would represent approximately 5½ tons of coal per year, based on an average of 12 hours per day. The labor of one man is released for other uses every time 50 hydroelectric horsepower is developed, and every 150 water horsepower developed releases one freight car for other duty.

* * * * *

The utilization of even one-third of the enormous amount of energy latent but now wasting in our falling waters would make the United States the greatest manufacturing country of the world. The development of our water powers is intimately connected with the solution of such great national problems as the national defense; extension of inland waterways; shortage of food; conservation of coal, oil, and labor; irrigation of arid lands; and railroad car shortage. In addition to conserving vast quantities of coal and labor to mine and handle it, the hydroelectric energy existing in our running waters will, when developed, be utilized in the manufacture of explosives, fertilizers, wood pulp and paper, electrochemicals, copper and aluminum, and in other industrial applications.

59 Cong. Rec. 241-242 (1919)

" *See* H.R. Rep. 910, 66th Cong., 2d Sess. (1920); Kerwin, *supra* note 34, at 255-63

the bill was passed by both houses and signed by President Wilson on June 11, 1920.

Thus was born the Federal Water Power Act of 1920, which "established firmly the principle of federal regulation of water power projects [and] . . . established a national policy in the use and development of water power on public lands and navigable streams." [45] The history of the Act shows beyond any doubt that the only
[1223] segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydroelectric power. Accordingly, as the Supreme Court has recognized, "the central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power—uses which, while unregulated, might well be contradictory rather than harmonious. . . . The principal use to be developed and regulated in the Act, as its title indicates, was that of hydroelectric power to meet the needs of an expanding economy." [46]

The Act itself, of course, was entitled the Federal Water Power Act; it could just as easily have been called the Federal Power Act (as it subsequently became), [47] or the Federal Water Resources Act, or some other name not indicating so specifically that the major use to be developed and regulated was the generation of hydroelectric power. The preface to the Act states:

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[45] Pinchot, *supra* note 34, at 19.

[46] *FPC v. Union Electric Co.*, 381 U.S. 90, 98-99 (1965); *see First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 180-81 (1946).

[47] *See* notes 83-86 *infra* and accompanying text.

> An Act to create a Federal Power Commission; to provide for the improvement of navigation; *the development of water power*; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes."

It is true, as petitioners point out, that statutory headings of complicated acts can provide no more than a very general guide and cannot limit the plain meaning of the statutory text.[10] But it does not follow that the regulation of steam plants can be subsumed under the words "and for other purposes" in the preface, which explicitly recites the broad, fundamental purposes of the Act.[11] We agree with intervenors that it is unlikely that, if Congress had intended to include the regulation of thermal-electric generation as a basic purpose of the Act, it would have limited reference in the preface to hydroelectric power—the lesser utilized of the two sources of electric power generation. The explicit reference to only hydroelectric power is consistent with the legislative history of concern with promoting the "comprehensive development of water power."[12]

Other provisions of the Act bear this out. For example, § 4(a), 16 U.S.C. § 797(a), authorizes the Commission to make investigations concerning the utilization of water resources of regions to be developed, concerning "the water-power industry and its relation to other industries and to interstate and foreign commerce," and concerning the location, capacity, development costs, and relation to markets of power sites—again, only water

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[10] 41 Stat. 1063 (emphasis added).

[11] *See Bhd. of R. Trainmen v. B. & O. Ry.*, 331 U.S. 519, 528-29 (1947).

[12] *See FPC v. Union Electric Co.*, 381 U.S. 90, 100-01 (1965).

[13] *FPC v. Union Electric Co.*, 381 U.S. 90, 101 (1965).

power is singled out for study. Section 10(a), *as amended*, 16 U.S.C. § 803(a), provided that licenses issued under the Act be issued on the condition that the projects adopted "shall be such as in the judgment of the commission will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, *of water-power development*, and of other beneficial public uses . . . ." (Emphasis added.) The proviso to § 24 *as amended*, 16 U.S.C. § 818, accorded retroactive application to that section's provision for the protection of licensees in their utilization of public lands for which application had been made for use in constructing "water power" facilities.

[1224] In recognition of the intent of Congress as expressed in the Act, the newly created Commission in its first annual report determined that its licensing jurisdiction extended only to construction of water power projects. In two opinions contained in that report, the Commission determined that it did not have licensing jurisdiction over either the construction of a dam in tidal waters for the purpose of allowing bathing and boating "and to cover unsightly flats" or the stringing of transmission lines because neither project was connected with the development of water power.[1] Elsewhere in that report, the Commission described its licensing jurisdiction as follows:

> "On neither the public lands and reservations nor on the waters of the United States is the jurisdiction of the Federal Power Commission as broad as the jurisdiction of Congress. The latter has authority over all forms of use; *the Commission is limited to the consideration of projects designed to produce water power.* Structures or diversions having any other purpose, unless incidental to works constructed for power purposes or a necessary part of a com-

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[1] *See* FPC, *First Annual Report* 138, 155 (1921).

> prehensive scheme of development, are not within the jurisdiction of the Commission."[14]

The Commission has adhered to this position consistently since 1921.[15]

We are told by petitioners, however, that this administrative interpretation of the Commission's jurisdiction is entitled to no weight because "consistent error is still error."[16] We are told that "the unadorned language of the Act"[17] is more significant than Commission interpretation; that administrative construction must yield to the "plain language and overall scheme" of the Act;[18] and that the jurisdictional judgment in this case does not require the kind of analysis of technical facts that would require us to defer to administrative expertise.

We have already indicated our disagreement with petitioners' argument that we need look no further than the language of §§ 3 and 4 of the Act to hold that the FPC has licensing jurisdiction over steam plants, and we discuss *infra* their contention that the purpose of the Act requires that we so hold even if the language does not.[19] Because the "unadorned language" of the Act, moreover,

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[14] *Id.* at 51-52 (emphasis added).

[15] *See, e.g.*, 1962 Annual Report of the FPC 12-13; 1966 *id.* at 8-9; 1 FPC, *National Power Survey* 100-01 (1964).

[16] *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678 n.5 (1954); *Nantahala Power & Light Co. v. FPC*, 384 F.2d 200, 206 n.12 (4th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

[17] *Nantahala Power & Light Co. v. FPC*, 384 F.2d 200, 206 (4th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

[18] *See, e.g., County of Marin v. United States*, 356 U.S. 412, 420 (1958); *United States v. New England Coal & Coke Co.*, 318 F.2d 138, 143 (1st Cir. 1963).

[19] *See* part II. B. *infra*.

does not compel the interpretation for which petitioners contend, consistent administrative construction to the contrary commands our respect; indeed, it is entitled to "great weight." [79] "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" [80]

[1225] It is not without significance, moreover, that this administrative interpretation was transmitted directly to Congress the year after passage of the Act, and that the only two significant amendments to the Act over the following fourteen years, including a reenactment of the Act in 1935, gave no hint of congressional desire to override the Commission's construction of the scope of its jurisdiction.[81] In 1930, a Reorganization Act was enacted [82] to improve the functioning of the Commission by making it independent and able to employ its own full-time staff. In 1935 the Water Power Act was amended by Title II of the Public Utility Act of 1935 [83] and was made part I of the Federal Power Act. The 1935 Act

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[79] *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972).

[80] *Power Reactor Dev. Co. v. Electrical Workers*, 367 U.S. 396, 408 (1961); *see Udall v. Tallman*, 380 U.S. 1, 16 (1965); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

[81] *Cf. Pacific Power & Light Co. v. FPC*, 184 F.2d 272, 275 (D.C. Cir. 1950).

[82] 46 Stat. 797, codified in 16 U.S.C. §§ 792, 793, 797(d) (1970).

[83] 49 Stat. 838, *as amended*, 16 U.S.C. §§ 792-823 (1970). *See* DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 Geo. Wash. L. Rev. 30, 30-38 (1945).

added parts II[84] and III[85] to the Act to regulate the interstate transmission and sale of electricity. The deletion of the word "Water" from the title reflected the expanded duties of the Commission under parts II and III; the original Federal Water Power Act was virtually unchanged.[86] It would have been a simple matter for Congress to have rejected the Commission's construction of its licensing powers by adding clarifying amendments to § 4(e) or to § 3. By reenacting unchanged the material provisions of the Act with knowledge of the contemporaneous construction placed upon the Act by those charged with its administration, Congress can be said to have indicated its satisfaction with that construction.[87]

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[84] 49 Stat. 847, *as amended*, 16 U.S.C. §§ 824-824h (1970).

[85] 49 Stat. 854, *as amended*, 16 U.S.C. §§ 825-825u (1970).

[86] As the House report explained:

> The amendments to the present Federal Water Power Act are all minor. They have been requested by the Federal Power Commission, largely for the purpose of clarifying the act in its application to situations that have arisen in its administration, and also to strengthen it in certain particulars. . . .

H.R. Rep. No. 1318, 74th Cong., 1st Sess. 7 (1935). The major changes were made in §§ 4 and 23 of the Act relating to Commission licensing authority over hydroelectric projects on nonnavigable waters but affecting interstate commerce. *See FPC v. Union Electric Co.*, 381 U.S. 90 (1965); *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 172 n.17 (1946); Sen. Rep. No. 621, 74th Cong., 1st Sess. 43 (1935).

[87] *Cammarano v. United States*, 358 U.S. 498, 510-11 (1959); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958); *United States v. Wyoming*, 331 U.S. 440, 452-53 (1947); *cf. FPC v. Union Electric Co.*, 381 U.S. 90, 110-12 n.30 (1965); *id.* at 112 n.1 (Goldberg, J., dissenting). *But see Safe Harbor Water Power Co. v. FPC*, 124 F.2d 800, 808 (3d Cir.), *appeal dismissed*, 313 U.S. 546 (1941).

Consistent judicial interpretation also requires us to reject petitioners' argument that the Act extends the Commission's licensing jurisdiction to steam plants.

The Supreme Court's first significant discussion[88] of the history and purpose of the Federal Water Power Act occurred in 1946 in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, in which the Court held that an applicant for a license under the Act did not have to obtain first a state permit and satisfy state requirements relating to the diversion of
[1226] water from waterways determined to affect the commerce interests of the United States.[89] The Court observed that the Act, when read in the light of its legislative history, disclosed "a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation" by exercising its power over commerce and the public lands to foster the "development of the navigable waters of the United States."[90] The "greatest step" taken by the Government in pursuit of this goal was the provision in the Federal Water Power Act for 50-year licenses "for the development of water power in the navigable waters of the United States."[91] Citing approvingly an article by Gifford Pinchot,[92] one of the major figures in the conservationist movement

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[88] The Court did consider several earlier cases involving various aspects of the Act. *See United States v. Appalachian Power Co.*, 311 U.S. 377 (1940); *Broad River Power Co. v. Query*, 288 U.S. 178 (1933); *Henry Ford & Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369 (1930); *New Jersey v. Sargent*, 269 U.S. 238 (1926).

[89] For application of this principle to water power projects on public lands, *see FPC v. Oregon*, 349 U.S. 435 (1955).

[90] 328 U.S. at 171-72.

[91] 328 U.S. at 172 n.17.

[92] Pinchot, *supra* note 34, at 19.

the Court briefly reviewed the history of the Act and characterized it as "distinctly an effort to provide federal control over and give federal encouragement to water power development."[93] The Court described the general purposes of the Act as follows:

> It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.
>
> It was a major undertaking involving a major change of national policy. That it was the intention of Congress to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation is apparent from the provisions of the Act . . . ."[94]

Six years later, the Court held that the Commission's duty of conserving water power resources and of developing comprehensive plans for waterways justified the Commission's imposition of the condition that a licensee permit the United States to interconnect its transmission lines with those of the licensee for the transfer of power generated in plants owned by the Government.[95] That same Term the Court held that congressional approval of a general plan for development of a river system did not deprive the Commission of jurisdiction under the Federal Power Act to decide whether private construction might be preferable to public development of water power

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[93] 328 U.S. at 180 n.23.

[94] 328 U.S. at 180-81.

[95] *FPC v. Idaho Power Co.*, 344 U.S. 17, 22-24 (1952).

sites within the system."[16] In describing the scope of the Commission's authority, the Court said:

> Extensive review of the need for integration of federal activities affecting waterways . . . and of the breadth of authority granted to the Commission by Congress in response to the need is hardly necessary to establish the role of the Commission in hydroelectric power development. *See, e.g., First Iowa Coop. v. Power Comm'n*, 328 U.S. 152, 180, 181, and cases cited. From the time that the importance of power sites were brought to public and congressional consciousness during the administration of President Theodore Roosevelt, the significant development has been the devising of a general power policy instead of *ad hoc* action by Congress, with all the difficulties [1227] and dangers of local pressures and log-rolling to which such action gave rise."[17]

In 1965, the most important, for our purposes, Supreme Court discussion of the language, history, and purpose of the Federal Water Power Act occurred in *FPC v. Union Electric Company*, 381 U.S. 90. In that case, the Court held that a license was required under the Act for the construction of a pumped-storage hydroelectric plant[18] that was to be located along a nonnavigable tributary of a navigable stream, would have no effect on the navigability of the main stream, but would generate electricity for interstate transmission. Congress,

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[16] *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953).

[17] 345 U.S. at 167-68.

[18] A pumped-storage plant uses energy from other sources, usually steam plants, to pump water from a low pool or other water source to a higher pool during periods of low electricity demand. During peak periods, the water from the higher pool is released down into the lower pool, and the falling water generates electricity just as in conventional hydroelectric establishments. *See FPC v. Union Electric Co.*, 381 U.S. 90, 92 & n.3 (1965).

the Court stated, had intended to draw on its full power under the Commerce Clause and not merely its authority over navigable waters in making it unlawful in § 23(b), 16 U.S.C. § 817, to construct unlicensed project works that would affect "the interests of interstate or foreign commerce." After briefly reviewing the history of the Act, citing the *First Iowa* case, *supra*, and stating that the principal use to be regulated in the Act "was that of hydroelectric power to meet the needs of an expanding economy,"[29] the Court explained why hydroelectric plants situated on nonnavigable waters and generating electricity in interstate commerce were subject to the Act but steam plants located on navigable waters were not:

> The respondent asserts that an anomalous consequence flows from the Commission's construction of the Act and its view that steam plants generating large amounts of energy for interstate transmission are not within the scope of § 23(b), although located along a stream over which Congress has jurisdiction. Since the Commission's jurisdiction here rests solely on the interstate transmission of energy, there can be no basis for distinguishing between a steam plant and a hydroelectric facility both generating energy for interstate use. The Court of Appeals, after noting that the generation of electric energy is a local or intrastate activity, concluded from this argument that "[t]he Commission's jurisdiction . . . must logically rest upon its delegated congressional jurisdiction over the interests of commerce on navigable waters." 326 F.2d, at 551. On this reasoning either the Act should, but does not, require a license for a steam plant when situated on the navigable mainstream itself, or should not, but does, require a license for a hydroelectric plant, pumped storage or otherwise, situated on the mainstream but which has no demonstrable effect, or a beneficial effect, on navigability. The answer to this conundrum is that unlike Part II of Title II of the Public Utility Act of 1935, under which the Commission regulates var-

[29] 381 U.S. at 99.

> ious aspects of the sale and transmission of energy in interstate commerce, Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission.[10]

The three dissenting Justices, disagreeing with the Court's broad reading of the commerce interests intended to be protected by the licensing provisions of the Act, did not believe that the "anomaly" created by exemption
[1228] of steam plants on navigable waters could be so easily explained away:

> However, even in terms of the "power potential in water," I fail to find a relevant distinction between a plant which artificially pumps water to an elevated reservoir in off-peak periods allowing it to fall and generate electricity at peak periods and a plant which heats water to create steam which generates electricity. I see no purpose of the Act that justifies producing this anomaly in the regulatory scheme. Under my view, of course, when interstate or foreign commerce is affected, Congress can constitutionally require licenses of both steam and hydroelectric projects, of either steam or hydroelectric projects, or of neither. *The legislative history here, however, establishes to my satisfaction that it has required licenses of neither steam plants nor the type of hydroelectric plant here involved*, and in light of this legislative history I agree with the Court of Appeals that Congress intended that a license be required only where the interests of commerce on navigable waters are affected.[11]

Thus, all nine Justices agreed that the FPC had no licensing jurisdiction over steam plants; they disagreed

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[10] 381 U.S. at 109-10 (footnotes omitted).

[11] 381 U.S. at 114-15 (Goldberg, J., dissenting) (footnote omitted) (emphasis added).

about the inference to be drawn from this for purposes of determining Commission jurisdiction over water power plants on nonnavigable waters.[102] It may well be, as petitioners contend, that this obiter dictum in the *Taum Sauk* case constituted an unsupported assumption for purposes of argument, that nonadversary determinations do not have the force of law,[103] and that the Court did not have before it the figures cited *supra*[104] indicating the tremendous impact modern steam plants have on the flow and thereby the power potential in the waterways on which they are located. It is significant, however, that the entire Court was in agreement that neither the language nor the history of the Act required the conclusion that the Act was intended to afford the FPC jurisdiction over steam plants. At the least, the dictum in the majority opinion and the statement in the dissent emphasize the weakness of petitioners' argument that the "unadorned language" of § 4(e) is alone sufficient to preclude resort to extrinsic aids and to require reversal of the dismissal order of the FPC.

The lower federal courts, with the exception of the Eighth Circuit in the *Taum Sauk* case[105] have not squarely faced the question presented by this case. Moreover, we have found no case in which a court, by dictum or otherwise, has suggested that the Federal Water Act

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[102] The Eighth Circuit agreed with the dissenting Justices in the *Union Electric* case that the Act was not intended to cover steam plants and therefore should not be read to include hydroelectric plants on nonnavigable waters. *Union Electric Co. v. FPC*, 326 F.2d 535, 550-51 (8th Cir. 1964).

[103] *See, e.g., Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 290 (1946); *SEC v. Sterling Precision Corp.*, 393 F.2d 214, 220 (2d Cir. 1968).

[104] *See* notes 19-20 & 27 *supra* and accompanying text.

[105] *See* note 102 *supra*.

contemplated the licensing of steam plants. Those courts (including this court) that have touched on the question at all appear to have assumed that the Act applied to only hydroelectric facilities.[106] The same can be said [1229] with respect to commentators,[107] although Willard Gatchell, the former general counsel to the FPC, was of the opinion that § 4(e) could have been read by the Commission to authorize the licensing of steam plants.[108]

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[106] *See, e.g., Montana Power Co. v. FPC*, 298 F.2d 335, 339 (D.C. Cir. 1962); *Pacific Power & Light Co. v. FPC*, 184 F.2d 272, 274 (D.C. Cir. 1950); *Safe Harbor Water Power Corp. v. FPC*, 124 F.2d 800, 806 (3d Cir.), *appeal dismissed*, 313 U.S. 546 (1941); *Clarion River Power Co. v. Smith*, 59 F.2d 861 (D.C. Cir.), *cert. denied*, 287 U.S. 639 (1932); *Appalachian Electric Power Co. v. Smith*, 4 F. Supp. 6, 24 (W.D. Va.), *rev'd on other grounds*, 67 F.2d 451 (4th Cir.), *cert. denied*, 291 U.S. 674 (1933); *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606 (M.D. Ala. 1922).

[107] *See* Kerwin, *supra* note 34, *passim*; LeBoeuf, *An Industry Appraisal of Federal Regulation of Electric Utilities under the Federal Power Act*, 14 Geo. Wash. L. Rev. 174, 190-93 (1945); Pinchot, *supra* note 34, *passim*; Ramey & Murray, *supra* note 13, at 35 & n.47; Schwartz, *Niagara Mohawk v. FPC: Have Private Water Rights Been Destroyed by the Federal Power Act?*, 102 U. Pa. L. Rev. 31, 36 (1953); Shields, *supra* note 54, at 143, 149; Smith, *supra* note 14, at 173; Starr, *supra* note 36, at 180; Tarlock, Tippy & Francis, *supra* note 13, at 514; Comment, *supra* note 13, at 99-100.

[108] Gatchell, *Jurisdictional Problems Under the Federal Water Power Act of 1920*, 14 Geo. Wash. L. Rev. 42, 44 (1945):

> Under this grant of authority, the Commission could issue a license for a steam-electric power plant located on a navigable stream, which utilized the water of such stream for condensing purposes and transmitted the power so generated across, along, or from such stream. Also, a power development utilizing steam rather than

With all respect to Mr. Gatchell, we believe, as shown above, that this overly literal reading of § 4(e) ignores the history and other language of the Act, and it is, of course, at odds with the overwhelming weight of authority.

B.

Similarly, we reject petitioners' contention that technological advances in the 53 years since the Act was passed have wrought such dramatic changes in the operation of steam plants that we should hold that the licensing of such plants by the FPC is consistent with, and indeed essential to, the purpose of the Act.

It is true, as petitioners point out, that recent developments in the technology of thermal-electric power generation have made possible the construction of generating units that dwarf the plants in use as recently as thirteen years ago.[109] An example is the Four Corners plants

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water power as the generating force could well have most of the physical structures listed in Section 3(11) of the statute in the definition of "project." Thus, there is no express limitation of the licensing authority to hydroelectric power plants as distinguished from steam-electric plants. Apparently the legislators considered the title to the Act (". . . to provide . . . for the development of water power . . .") as sufficient to exclude steam-electric plants. The Commission has justified such confidence by never claiming authority to license steam plants, stating in its First Annual Report that it was limited to consideration of projects designed to produce water power."

[109] In 1 FPC, *National Power Survey* 14 (1961), the following table appears.

[Footnote continued on page 86]

involved in this litigation. The tremendous growth in the demand for electricity has resulted in an enormous expansion of the installed thermal-electric capacity [11] and a corresponding increase in the amount of water [1230] need for cooling. [12] Giant complexes such as the Four

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[11] [Continued]

Maximum Sizes of Generating Units in the United States

(In megawatts—1 megawatt equals 1,000 kilowatts or 1,000,000 watts)

	Maximum turbine Rating—MW
1900	1.5
1920	60
1930	[1] 208
1940	[2] 208
1950	[1] 208
1956	260
1958	335
1960	450
1963	650
1965	[2] 1,000

[1] Represents a single unit. More typically, maximum prevailing sizes were 75 mw in 1930, 100 mw in 1940, and 175 mw in 1950.

[2] Under construction.

[12] Petitioners point out that in 1920, the total generating capacity of all steam plants in the United States was 8,900 megawatts, Edison Electric Institute, *Historical Statistics of the Electric Utility Industry* 4 (Pub. No. 62-69, 1969); by 1971, total installed capacity of conventional steam plants was 298,345 megawatts, Edison Electric Institute, *Statistical Year Book of the Electric Utility Industry for 1971*, at 6-7 (No. 39, Pub. No. 72-25, Oct. 1972).

[13] The 120 billion gallons a day needed by 1971, *see* note 20 *supra* and accompanying text, is an increase over an esti-

Corners plants will withdraw (often permanently) such large amounts of water [112] that the "power potential" of majority waterways will be affected adversely to an extent greater than that of hydroelectric facilities. Thus, private power interests, petitioners argue, have succeeded in appropriating the power potential in public waters just as their predecessors did in the first part of this century when they built at will upon public lands and in navigable waters. The Supreme Court, it is argued, was not apprised in the *Taum Sauk* case of the extent of water consumption of modern steam plants and the resulting impact on our water resources.

In view of these developments, petitioners argue, FPC licensing jurisdiction should be expanded to effectuate the regulatory scheme envisioned by Congress when it enacted the Federal Water Power Act. The Act was intended to close the regulatory gap [113] created by piecemeal legislation that had served very narrow interests in the comprehensive management of water resources. Accordingly, it must be read to comprehend the regulation of steam plants so that the congressional purpose of promoting orderly development will not be frustrated.

Finally, petitioners argue that an "independent federal agency responsible for regulating a particular industry is given a broad mandate to do all things neces-

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mated 178 million gallons of cooling water needed on a daily basis in 1920. This latter figure is the product of 8,900 megawatts (*see* note 110 *supra*) by 20, which represents the number of gallons per kilowatt per day utilized by inefficient steam plants. *See* Staff of Joint Congressional Comm. on Economics, 91st Cong., 2d Sess., *The Economy, Energy, and the Environment* 99 (Comm. Print 1970).

[112] *See* note 27 *supra* and accompanying text.

[113] *Cf. Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

sary to implement its mandate." [114] This implied "necessary and proper" power encompasses the power of an agency to take account of technological developments that render existing regulatory practices obsolete, [115] and to adjust its operations to govern specific evils not named within its enabling act but clearly anticipated by a flexible statutory command. [116] The Federal Water Power Act, as amended, has given the FPC a "flexible mandate . . . to regulate the interstate electric power industry" and "to institute comprehensive planning for the nation's waterways," [117] and to this end it is necessary that the Commission license and regulate modern-day steam plants, which "threaten to resurrect the evil that regulation was supposed to thwart." [118]

The argument, despite its undeniable appeal, nevertheless, fails. Our natural reluctance to reject explicit language of the Supreme Court—language which, albeit obiter dictum, commanded unanimous agreement of the Justices—is reinforced by several factors. First, of course, the FPC does not have a broad, abstract mandate either to regulate the electric power industry or to engage in comprehensive planning for the utilization of our major waterways. In contrast, the Federal Communications Commission has "broad responsibilities for the orderly development of an appropriate system of local television broadcasting," [119] responsibilities derived from the "uni-

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[114] Petitioners' brief at 42.

[115] *See, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

[116] *See, e.g., American Trucking Ass'n v. United States*, 344 U.S. 298 (1953).

[117] Petitioners' brief at 44, 45.

[118] Petitioners' reply brief at 24.

[119] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).

fied and comprehensive regulatory system for the [broadcasting] industry" established by the Communications Act of 1934, 47 U.S.C. § 151 et seq. (1970).[28] The
[1231] Federal Water Power Act of 1920 was intended to promote the comprehensive development of the Nation's water resources in the context of regulating hydroelectric power: "the comprehensive development of water power . . . was the central thrust of the Act . . . ."[29] It could not be seriously contended, for example, that § 4(e) of the Act empowered the FPC to license the improvement of a tributary of a navigable river for purposes of navigation or flood control or irrigation in the absence of the development of power from the project.[30] Similarly, although under the holding of the *Taum Sauk* case, the FPC can license hydroelectric plants on nonnavigable waters if the plants transmit their power in interstate commerce, the agency was not authorized to regulate generally the interstate transmission and sale of electricity by nonlicensees until the Act was amended in 1935.[31] The 1920 Act thus did not direct the FPC to

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[28] *Id.* at 168.

[29] *FPC v. Union Electric Co.*, 381 U.S. 90, 101 (1965).

[30] Indeed, the literal language of § 4(e) precludes such a contention. Under that section, the Commission can license project works "necessary or convenient for the development and improvement of navigation *and* for the development, transmission, and utilization of power . . . ." (Emphasis added.)

[31] *See, e.g., United States v. Public Utilities Comm'n of Calif.*, 345 U.S. 295 (1953). It is interesting to observe that in the California PUC case, the Court, in rejecting the argument that the regulatory jurisdiction conferred on the FPC by the 1935 amendments did not include jurisdiction over the transmission of electricity by companies licensed under the 1920 Act, appeared to assume that only hydroelectric projects could be licensed: "not once is [the rate authority granted to the agency by the 1935 amendments] spoken of as one con-

regulate broadly the Nation's electric power industry or its major waterways, and we cannot conclude that recognizing Commission jurisdiction over steam plants is essential to fulfillment of the agency's congressional mandate.

Second, we agree that modern steam plants are of a size and efficiency unknown at the time of the passage of the Federal Water Power Act, that they use correspondingly more water for cooling purposes, and that the earlier plants returned most of their cooling waters to the water source instead of evaporating it. Still most of the electric power produced in this country at the time the Act was passed was generated by water-cooled steam plants.[14] Thus, any legislation intended to regulate comprehensively the interrelationship between the production of power and the efficient management of water resources would surely have taken account of the existence of these water-using steam plants. Congress' failure to do so refutes the argument that the FPC should regard steam plants as an unspecified or unanticipated method of operation whose regulation should now be undertaken as an obvious part of the congressional scheme. Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness.

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ditioned on the electricity concerned having been produced by steam generators or at unlicensed dams." 345 U.S. at 308.

[14] In 1920, of the approximately 50 billion kilowatt hours of electricity generated in the United States, about 70% was produced by steam power. Edison Electric Institute, *Statistical Year Book of the Electric Utility Industry for 1971*, at 17 (No. 39, Pub. No. 72-25, Oct. 1972); 1 FPC, *National Power Survey* 63 (1964). Although petitioners concede that most steam plants in 1920 were water-cooled, instead of air-cooled, they point to the insignificant water use of those plants compared with the use of modern plants. *See* notes 110-11 *supra*.

The limits of this part of petitioners' argument may well have been reached in the *Taum Sauk* case and other
[1232] cases [125] in which it was recognized that the FPC is empowered to license pumped-storage plants, which utilize fossil fuel to pump water into reservoirs and then permit the water to fall to generate power during peak periods. The majority of the Court in the *Taum Sauk* case thought the distinction between steam plants and pumped-storage plants, in terms of the "power potential in water," an "obvious" and "meaningful" one; [126] and, although three justices disagreed, it is interesting to observe that the dissent thought the relevant comparison to be between the pumped-storage plant's utilization of fossil fuel to elevate water for storage purposes and the steam plant's utilization of fossil fuel to heat water for generating purposes.[127] If the "power potential in water" is not involved when water is heated to drive a turbine, there would appear to be less warrant to conclude that it is involved when water is used in the post-generation, cooling process.[128] And there would be no

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[125] *See, e.g., Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied, sub. nom. Consolidated Edison Co v. Scenic Hudson Preservation Conf.*, 384 U.S. 941 (1966). *On remand*, 44 F.P.C. 350 (1970), *aff'd*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

[126] 381 U.S. at 110.

[127] 381 U.S. at 115 (Goldberg, J., dissenting).

[128] We are aware, as petitioners point out, that the use of cooling waters is necessary to increase the efficiency of the generating process:

> This cooling process is a matter not of convenience but of economic necessity. As the steam is exhausted into the condenser and cooled by the water, it condenses to liquid, thus occupying a smaller space than it did formerly and producing a partial vacuum. This vacuum at the exhaust of the turbine permits the entering high-pressure steam to undergo greater expansion, and hence deliver

warrant to conclude that the mere extraction of water, with a consequent decrease in the amount of water available to downstream users for power generation, utilizes the "power potential in water" in a manner impinging on the FPC's licensing jurisdiction.

We are not unsympathetic to petitioners' position. It is somewhat anomalous that the FPC exercises stringent controls over the construction and operation of the great majority of the nation's hydroelectric installations,[128] not operated by federal agencies, but at the same time has no comparable authority with respect to non-hydroelectric installations which in 1971 generated over 80% of the electricity produced in the United States,[130] and utilized large quantities of water in doing so. In this

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more energy to the turbine rotor, than if it expanded only to the pressure of the atmosphere. Roughly, the over-all efficiency of producing useful work from high-pressure steam can be in the 40 to 50 per cent range if the exhaust steam is condensed by use of cooling water, whereas it will be only 30 to 40 per cent if the turbine exhaust is directly to the atmosphere . . . .

P. Cootner & O. Lof, *Water Demand for Steam Electric Generation* 8-9 (1965).

[128] As of 1964, the FPC had licensed about 76% of the conventional, nonfederal hydroelectric capacity of the United States. 1 FPC, *National Power Survey* 101 (1964).

[130] Edison Electric Institute, *Statistical Year Book of the Electric Utility Industry for 1971*, at 2, 18-19 (No. 39, Pub. No. 72-25, Oct. 1972), gives the following figures for 1971:

Total electric power generation (kwh in millions)	1,613,936
Hydro	266,320
Conventional Steam	1,303,465
Nuclear Steam	37,899
Internal Combustion	6,252

age of pervasive federal regulation and of heightened awareness of environmental considerations, it is difficult to comprehend that there should be no federal agency or policy governing the siting and operation of fossil-fueled steam plants. One looks in vain through an array of state and federal legislation for a unified, comprehensive regulatory scheme governing power plant siting.[131] Apart from the Federal Power Act and the Atomic Energy Act, [1233] 42 U.S.C. §§ 2011-296 (1970),[132] regulating the construction and operation of hydroelectric plants and nuclear-powered steam plants by the FPC and the Atomic Energy Commission, respectively, federal controls over various aspects of electric power plants are exercised under such diverse legislation as the Rivers and Harbors Act, 33 U.S.C. § 403 (1970), which requires a federal permit to obstruct or modify the course of navigable waters; the Federal Water Pollution Control Act, *as amended*, 33 U.S.C. §§ 1251-376 (Supp. II, 1971-72), which, *inter alia*, provides for the establishment of effluent limitations for navigable waters; the Air Quality Act of 1967, *as amended*, 42 U.S.C. §§ 1857-571 (1970), which, *inter alia*, establishes national ambient air quality standards for several pollutants; and provisions requiring federal approval for the leasing of Indian lands for the construction of power plants, 25 U.S.C. § 635 (1970), and for the location of transmission lines and rights of way

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[131] The siting problem is discussed in Journey, *Power Plant Siting—A Road Map of the Problem*, 48 Notre Dame Law. 273 (1972); Ramey & Murray, *supra* note 13; Smith, *supra* note 14; Tarlock, Tippy & Francis, *supra* note 13; Comment, *supra* note 13.

[132] For discussion of the role of the AEC in power plant construction and operation, *see Calvert Cliffs' Coordinating Comm., Inc. v. United States AEC*, 449 F.2d 1109 (D.C. Cir. 1971); Journey, *supra* note 131, at 281; Smith, *supra* note 14, at 172-73; Tarlock, Tippy & Francis, *supra* note 13, at 523-29, 533-39.

across Indian lands, 25 U.S.C. § 323 (1970), national parks, 16 U.S.C. § 5 (1970), or national forests, 16 U.S.C. § 522 (1970).[133] Under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. (1970), the decisions made by federal officers must include consideration of environmental factors and must be accompanied by the completion of certain procedural steps including the filing of environmental impact statements.[134] In addition, there may be federal legislation peculiarly applicable to the operations of particular power plants, such as the extensive regulation of withdrawals of water from the Colorado River system.[135] But there is no comprehensive federal legislation governing the

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[133] For discussion of these various statutes and their relationship to power plant siting, see Tarlock, Tippy & Francis, *supra* note 13, at 513-39; Comment, *supra* note 13, at 84-92; Comment, *supra* note 28, at 708-11, 712-15.

[134] *See, e.g., Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1173-76 (6th Cir. 1972); *Calvert Cliffs' Coordinating Comm., Inc. v. United States AEC*, 449 F.2d 1109, 1112-15 (D.C. Cir. 1971); Tarlock, Tippy & Francis, *supra* note 13, at 533-39; Comment, *supra* note 28, at 709-10.

[135] The Colorado River is apportioned between the Upper and Lower Basin states by the Colorado River Compact, *see* 70 Cong. Rec. 324 (1928), and among the states within the basin by the Upper Basin Compact, 63 Stat. 31 (1949), and the Boulder Canyon Project Act, 43 U.S.C. §§ 617-17u (1970). *See Arizona v. California*, 373 U.S. 546 (1963). In times of shortage, the Secretary of the Interior has authority to allocate the waters among the states and among the users of each state. *See Arizona v. California, supra*, 373 U.S. at 579-90. Other federal controls over the flow of the river are provided by the Mexican Water Treaty, T.S. 994, 59 Stat. 1219; the Colorado River Storage Project Act, 43 U.S.C. §§ 620-620o (1970); and the Colorado River Basin Project Act, 43 U.S.C. §§ 1501-56 (1970). For a history and discussion of the Colorado River legislation, see H.R. Rep. No. 1312, 90th Cong., 2d Sess. (1968), in 3 U.S. Code Cong. & Ad. News 3666 (1968).

siting or operations of fossil-fueled power plants. Regulation such as it is,[136] is piecemeal and fortuitous. And, federal regulation is complicated by the existence of numerous state commissions having varied responsibilities for plant siting.[137]

It may be, as petitioners argue, that the FPC is the logical agency to design and implement a national siting policy. The Commission has had over 50 years of experience licensing hydroelectric facilities, and since 1935 has engaged in extensive supervision of bulk power suppliers. The Commission is developing an expertise, ac-
[1234] celerated by several important judicial decisions,[138] in dealing with environmental problems arising in connection with the construction of power facilities. Indeed, the Commission agrees that it should be the primary

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[136] *See* Comment, *supra* note 28.

[137] For discussion of state regulation of plant siting, see Tarlock, Tippy & Francis, *supra* note 13, at 539-53; Comment, *supra* note 28, at 711-17. A table of state siting laws is contained in Journey, *supra* note 131, app. B.

[138] *See Udall v. FPC*, 387 U.S. 428 (1967); *Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co. v. Scenic Hudson Preservation Conf.*, 384 U.S. 941 (1966), *on remand*, 44 F.P.C. 350 (1970), *aff'd*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); *Pacific Gas & Electric Co.*, 44 F.P.C. 198 (1970); *Arkansas Power & Light Co.*, 40 F.P.C. 522 (1968); *Susquehanna Power Co.*, 32 F.P.C. 826 (1964); *Minnesota Power & Light Co.*, 32 F.P.C. 1407; *PUD No. 1 of Skamania County, Wash.*, 32 F.P.C. 414 (1964); *Puget Sound Power & Light Co.*, 28 F.P.C. 718 (1962); *Citizens Utilities Co.*, 21 F.P.C. 455 (1959); *Namekagon Hydro Co.*, 12 F.P.C. 203 (1953), *aff'd sub. nom. Namekagon Hydro Co. v. FPC*, 216 F.2d 509 (7th Cir. 1954). *See generally* Tarlock, Tippy & Francis, *supra* note 13, at 515-20; Note, *Of Birds, Bees, and the FPC*, 77 Yale L.J. 117 (1967).

certifying agency for plant siting. Its Chairman has advocated such authority[13] on many occasions and the agency has supported several bills introduced in Congress in the past decade providing for federal control over the construction and operation of fossil-fueled power plants and related facilities.[14]

Notwithstanding the foregoing, and quite apart from the practical problems of implementation and administration of the extensive licensing authority that petitioners would have us bestow upon the FPC,[15] adoption of the

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[13] *See* Hearings on H.R. 5277 and Related Bills Before the Subcomm. on Communications of the Senate Comm. on Interstate Commerce, 92d Cong., 1st Sess., pt. 2, at 126-27 (1971) (testimony of FPC Chairman Nassikas); Nassikas, *Coordination of Electric Power and Environmental Policy*, 4 Nat. Res. Law. 268 (1971).

[14] In its 1962 and 1966 annual reports, the Commission recommended that the Federal Power Act be amended to give it licensing jurisdiction over diversion facilities of steam plants. *See 1962 Annual Report of the FPC* 12-13; *1966 Annual Report of the FPC* 8-9. Among the bills introduced in Congress over the past few years that the Commission has favored are H.R. 12585, 91st Cong., 1st Sess. (1969); S. 4121, 91st Cong. 2d Sess. (1970); H.R. 6971, 92d Cong., 1st Sess. (1971); H.R. 5277, 92d Cong., 1st Sess. (1971). For description and analysis of the major siting proposals of recent years, see Journey, *supra* note 131, at 284-302; Ramey & Murray, *supra* note 13, at 38-43; Smith, *supra* note 11, at 182-95; Tarlock, Tippy & Francis, *supra* note 13, at 553-67.

[15] *Cf.* the problems encountered by the FPC in attempting to regulate the sales of natural gas by local producers to interstate pipeline companies after the decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954): the Court later referred to these attempts as "the outstanding examples in the federal government of the breakdown of the administrative process." *Permian Basin Area Rate Cases*, 390 U.S. 747, 758 (1968).

Power plant siting is an extraordinarily complex process requiring the integration of many different factors. *See* au-

position they assert would accomplish by judicial fiat what Congress has refused or neglected to accomplish when it enacted and later amended the Federal Water Power Act. We are restricted to the statute as written by the Congress, illuminated by legislative history, and construed by the Supreme Court. It is not our function either "to rewrite a statute so that it will authorize what [we think] should be authorized"[142] or to "write [1235] into an act of Congress a provision which Congress affirmatively omitted."[143] These canons would be violated if we were to order the FPC to assert jurisdiction over fossil-fueled steam plants. The arguments made by petitioners would be better addressed to the Congress, which has not yet decided to provide explicitly for federal regulation of power plant siting.

III.

In addition to the nonfederal construction and operation of hydroelectric project works, § 4(e) empowers the FPC to issue licenses "for the purpose of utilizing the surplus water or water power from any Government dam . . . ." Petitioners contend that two of the Four Corners plants—Navajo and Kaiparowitz—will withdraw water directly from impoundments created by a Government dam, and that the other four plants are

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thorities cited in note 131 *supra*. FPC Chairman Nassikas has indicated that any effective legislative scheme for plant siting should provide for a transitional period to assure continuity of bulk power supply and the financing of projects already in the planning stages. *See* Hearings on Powerplant Siting and Environmental Protection Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 1st Sess. 26-27 (1971).

[142] *Story v. Snyder*, 184 F.2d 454, 459 (D.C. Cir.), *cert. denied*, 340 U.S. 866 (1950).

[143] *Border Pipe Line Co. v. FPC*, 171 F.2d 149, 152 (D.C. Cir. 1948).

downstream from Government dams and will have water available on a dependable basis only because of the "stream regimen imposed by upstream government dams."[144] According to petitioners, these are usages of "surplus water" that invoke Commission jurisdiction under § 4(e) and require the Commission to regulate the operations of the Four Corners plants. We agree that § 4(e) empowers the FPC to license the use of surplus water by steam plants, and accordingly we remand to the Commission for consideration of petitioners' "surplus water" claim.[145]

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[144] Petitioners' brief at 9.

[145] Although intervenors contend otherwise, the Commission in its brief to us concedes that, with respect to the Navajo and Kaiparowitz plants, petitioners preserved their "surplus water" argument in their application for rehearing as required by § 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b) (1970), as a precondition to our consideration of the claim. Intervenors and respondent assert, however, that neither the complaint nor the rehearing application raised the question of the applicability of the "surplus water" clause to the four plants not withdrawing water directly from Government impoundments, and they contend that we may not consider the claim as it relates to those plants. In the posture of this case, and in view of our resolution of the "surplus water" issue, it makes little difference whether we agree with this contention; petitioners can simply file an amended complaint setting forth the downstream claim, and the FPC will consider it in the first instance just as it will consider the primary "surplus water" claim. Further, we think that intervenors' and respondent's position is not well taken. The policy of § 313(b) of affording an agency the opportunity to consider and determine a question, *see, e.g., FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 499 (1954), was clearly satisfied because Commission rejection (by silence) of the primary "surplus water" claim obviously amounted to a rejection of the secondary claim. And, because petitioners could file an amended complaint raising the secondary claim, the issue would be before us at a future date. Accordingly, the exhaustion requirement of § 313(b) would be inapplicable in this case.

As they do with respect to their broader claim under § 4(e), petitioners rely on the literal language of the Act to support their contention that the FPC is empowered to license the operations of the Four Corners plants. Quite simply, they contend, the plants utilize "surplus water" from Government dams for purposes of generating power.[146] Petitioners accept the following definition of "surplus water" offered by the Commission in a case involving a hydroelectric project downstream from a Government dam:

> Where there is available stored water not to be used in irrigation, which represents storage over and above that needed for irrigation, and which would otherwise flow unused down the main channel of the stream, that water is "surplus water," and, if used for power development, would require a license from this Commission.[147]

[1236] Petitioners also point out that under the FPC's own determination, the surplus water need not be withdrawn directly from a Government impoundment in order to trigger FPC licensing jurisdiction:

> It . . . appears immaterial to the Commission's licensing authority under the "surplus water" clause of section 4(e), whether hydroelectric developments utilizing the surplus water from a Government dam are constructed at, or in the immediate vicinity, or several miles downstream from the Government dam. On the other hand, the Commission's licensing authority with respect to hydroelectric development utilizing "water power" from Government dams is limited by natural laws to those developments at or in the vicinity of such dams. The natural laws re-

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[146] Petitioners point out that the use of cooling water is a necessary part of the power generation process. *See* note 128 *supra*.

[147] *California Oregon Power Co.*, 13 F.P.C. 1, 4 (1954), *supplemental opinion*, 15 F.P.C. 14 (1956), *petition dismissed*, 239 F.2d 426 (D.C. Cir. 1956).

> lating to the use of "water power" are such that its utilization may only be at the dam when the power house is integral therewith, or at the downstream end of a pressure conduit leading from the intake to the turbines in the power house. Thus, the "water power" utilized at or in the vicinity of a dam is the result of the head and flow there available.
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> . . . [W]e have found nothing in the language of the act, or in its legislative history, which leads us to believe that the Commission's licensing authority under the "surplus water" clause of section 4(e) is limited to hydroelectric power projects located at or in the immediate vicinity of a Government dam.[18]

Accordingly, petitioners argue, giving the language of the "surplus water" clause its ordinary meaning, reading it disjunctively to the "constructing, operating, and maintaining" clause of § 4(e), and following the Commission's own definitions, all six Four Corners plants are utilizing "surplus water" within the intendment of the Federal Power Act.

Respondent Commission argues that Congress intended the Federal Water Power Act to apply only to water power projects, as indicated by the Act's legislative history, and that steam plants are not "project works" within the Commission's licensing authority. Intervenors contend that the "surplus water" provision applies only to hydroelectric plants utilizing surplus water or water power from Government dams.

We think that the Commission and intervenors construe the "surplus water" clause too narrowly. Initially, it should be observed that the "surplus water" clause does not refer to the licensing of "project works" as does the "constructing, operating, and maintaining" clause. The words "project works" in the latter clause

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[18] *California Oregon Power Co.*, 15 F.P.C. 11, 19 (1956), *petition dismissed*, 239 F.2d 426 (D.C. Cir. 1956).

follow the words "for the purpose of," and they are not found at all in the "surplus water" clause even though that clause is introduced by a second "for the purpose of." By their terms, then, the two licensing provisions of § 4(e) encompass different activities, and it does not follow that the limitation of the reach of the "constructing, operating, and maintaining" clause of hydroelectric projects requires reading a similar limitation into the language of the "surplus water" clause.

Second, unlike the situation with respect to the "constructing, operating, and maintaining" clause, there is little in the way of extrinsic illumination of the congressional purpose in enacting the "surplus water" clause. There is no judicial decision on its scope; the FPC decisions quoted above interpret the clause in the context of proposed hydroelectric developments;[149] and there ap-
[1237] parently is no useful legislative history. What little extrinsic assistance we have been able to piece together, however, tends to show that the language of the "surplus water" clause does indeed mean what it says.

In a line of cases extending back almost thirty years before the passage of the Federal Water Power Act, the Supreme Court confirmed the power of Congress to dispose of the water power inherent in waters over which Congress had jurisdiction, either by generating and selling the power itself or by permitting others to do so.

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[149] The Commission has in the past permitted its licensees to allow waters impounded by their reservoirs to be used for cooling purposes by steam plants, *e.g.*, *Arkansas Power & Light Co.*, 40 F.P.C. 522 (1968); *Duke Power Co.*, 36 F.P.C. 675 (1966), but it has refused in such cases to construe its licensing authority to extend to the operations of the steam plants utilizing the waters, *e.g.*, *Brazos River Authority*, 34 F.P.C. 1507, 1509 (1965). Of course, these decisions involved the "constructing, operating, and maintaining" clause, not the "surplus water" clause.

The basic principle was established in the first *Green Bay* case, *Kaukauna Water Power Company v. Green Bay and Mississippi Canal Company*, 142 U.S. 254 (1891), in which the Court recognized that a state could, consistent with its power to condemn property for a public purpose, reserve for itself for disposition as it saw fit the water power created by the erection of a dam under state auspices for purposes of improving navigation. The Court reasoned that

> if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. . . . As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement.[19]

Seven years later, the Court applied this principle in the second *Green Bay* case, *Green Bay and Mississippi Canal Company v. Patten Paper Company*, 172 U.S. 58 (1898), *rehearing denied*, 173 U.S. 179 (1899), to uphold the right of a grantee of the United States to lease the surplus water power from Government navigation works to other private parties, against a claim by certain riparian owners that they were entitled under state law to an equal apportionment of the water flow and hence of the water power inherent in the river. Describing the case as one involving "water power incidental to the construction and maintenance of a public

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[19] 142 U.S. at 273.

work and, from the nature of the case, subject to the control of the public authorities, in this instance the United States,"[151] the Court relied heavily on the first *Green Bay* case to hold that the grantee's right to the water power created by the works was superior to the riparian rights recognized under state law:

> . . . [I]t is . . . plain that the mode and extent of the use and enjoyment of [the water power and appurtenant property] by the Canal Company fall within the sole control of the United States. At what points in the dam and canal the water for power may be withdrawn, and the quantity which can be treated as surplus with due regard to navigation, must be determined by the authority which owns and controls that navigation. In such matters there can be no divided empire.'[152]

It was but a short step to the decision in *United States v. Chandler-Dunbar Water Power Company*, 229 U.S. 53 (1913), in which the Court rejected the argument that a federal condemnation of certain riparian property for purposes of improving navigation did not amount to a taking for a public purpose because a section of the
[1238] condemnation act authorized the Secretary of War to sell the surplus water power after the Government had made the navigation improvements. The Court considered the question largely settled by the decision of the first *Green Bay* case that "[i]f the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the Government."[153] The Government, in a word, could become a water power entrepreneur once it had constructed a dam for a legitimate public purpose.

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[151] 172 U.S. at 76.

[152] 172 U.S. at 80.

[153] 229 U.S. at 73.

However, the "development of our rivers by no means kept pace with the scope of congressional power as defined by the Supreme Court decisions."[154] Congress was slow to appreciate the value of multiple-purpose waterway projects, in particular the tremendous value, from both a pecuniary and a functional standpoint, of the water power within its control. There were a few exceptions. An early act allowed the Secretary of War to lease the water power at a federal arsenal to a private water power company on condition that the company complete the development of the power and maintain it at its own expense.[155] Another early act authorized projects combining irrigation and flood control.[156] In addition, several appropriations bills contained provisions permitting the leasing of the use of the water power of certain navigable waterways, limited to the use of surplus water not required for navigation, with the stipulation that the interests of navigation remain paramount.[157] But, in the Reclamation Act of 1902,[158] under which the Government became involved in the large-scale construction of irrigation works on the public lands in the West, no provision was made for the disposition of water power created by the reclamation dams.

During Theodore Roosevelt's administration, however, a number of significant developments occurred. In 1906, the Reclamation Act was amended to allow the Secretary of the Interior to lease surplus water power:

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[154] Fly, *supra* note 34, at 279.

[155] Act of March 3, 1879, ch. 182, 20 Stat. 377, 387.

[156] 25 Stat. 505, 526 (1888); *see* Fly, *supra* note 34, at 287.

[157] Act of August 11, 1888; ch. 860, 25 Stat. 400, 417; Act of September 19, 1890, ch. 907, 26 Stat. 426, 417; Act of June 28, 1902, ch. 1299, 32 Stat. 408, 409.

[158] 32 Stat. 388, *as amended*, 43 U.S.C. §§ 371 et seq. (1970).

> Whenever a development of power is necessary for the irrigation of lands . . . or an opportunity is afforded for the development of power under any [reclamation] project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege . . . . *Provided*, That no lease shall be made of such surplus power or power privileges as will impair the efficiency of the irrigation project . . . .[159]

After this amendment, the Government became involved in the business of generating hydroelectric power, primarily because of the works constructed for pumping purposes at reclamation projects,[160] and the principle of sale of surplus water power was introduced to Government projects bearing no necessary relation to navigation. President Roosevelt, in his several vetoes of power site bills and his appointments of commissions such as the Inland Waterways Commission,[161] made clear that the development of water power should be used by the Government to defray the cost of waterway improvement,
[1239] and that efficient water resource management required the integration of many water uses in single projects.[162] Condemnation acts such as that involved in the *Chandler-Dunbar* case, *supra*, began to incorporate provisions authorizing the Government to develop water power for its own use or lease at Government projects intended primarily to accomplish other purposes.

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[159] Act of April 16, 1906, ch. 1631, § 5, 34 Stat. 117, *as amended*, 43 U.S.C. § 522 (1970).

[160] *See Burley Irrigation Dist. v. Ickes*, 116 F.2d 529, 530-32 (D.C. Cir. 1940), *cert. denied*, 312 U.S. 687 (1941); 1 FPC, *National Power Survey* 100 (1964).

[161] *See* note 49 *supra*.

[162] *See* Fly, *supra* note 34, at 290.

In the second decade of this century, the soundness of President Roosevelt's position on water resource development became increasingly recognized. Legislative developments included the 1910 amendment to the General Dam Act,[163] and another amendment to the Reclamation Act, which provided that surplus storage and carrying capacity developed in a particular reclamation project could be utilized on a contractual basis by other distributors of irrigation waters.[164] A Senate subcommittee report issued in 1912 declared:

> If, for the purpose of improving the navigability of a stream carrying interstate commerce, the Federal Government constructs and maintains a dam, with locks and gates, the Government has the undoubted right to establish and maintain, in connection with such dam, an electric-power plant for the purpose of furnishing motive power to operate such locks and gates. And the Federal Government has the right to sell, lease, or rent, for compensation, any surplus power that may arise from and be an incident to such an improvement of navigation.[165]

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[163] *See* note 49 *supra* and accompanying text.

[164] Act of February 21, 1911, ch. 141, 36 Stat. 925, codified in 43 U.S.C. §§ 523-25 (1970).

[165] 48 Cong. Rec. 11,568, 11,571 (1912), subsequently published as Sen. Doc. No. 246, 64th Cong., 1st Sess. 17 (1916), quoted in Fly, *supra* note 34, at 290. One year after the decision in *United States v. Chandler-Dunbar Water Power Company*, 229 U.S. 53 (1913), the Adamson Bill, H.R. 16053, 63d Cong., 2d Sess. (1914), was introduced in Congress as the first of the bills leading to the enactment of the Federal Water Power Act. It contained a provision authorizing the leasing of surplus power developed by Government water power plants. *See* Kerwin, *supra* note 34, at 176. In 1916, Senator Newlands attempted to amend the Shields Bill to provide an appropriation for developing multiple-purpose waterway projects and formulating plans for comprehensive development of the major river system. *See* 53 Cong. Rec. 3733-36 (1916); Fly, *supra* note 34, at 292; Kerwin, *supra* note 34, at 205-16.

In 1917, a rivers and harbors appropriation act created a Waterways Commission to coordinate the various bureaus and commissions of the United States with responsibility for water resources, to investigate questions relating to the improvement and control of navigation with respect to all watersheds in the United States, and to include

> therein the related questions of irrigation, drainage, forestry, arid and swamp land reclamation, clarification of streams, regulation of flow, control of floods, utilization of water power, prevention of soil erosion and waste, storage, and conservation of water for agricultural, industrial, municipal, and domestic uses, cooperation of railways and waterways, and promotion of terminal and transfer facilities, to secure the necessary data, and to formulate and report to Congress, as early as practicable, a comprehensive plan or plans for the development of waterways and the water resources of the United States for the purpose of navigation and for every useful purpose.[166]

The Act of 1917 was explicitly repealed by the Act of 1920,[167] and the newly created Federal Power Commission took over the planning and coordination responsibilities of the Waterways Commission,[168] which included
[1240] consideration of a spectrum of water uses not related to water power.

The Federal Water Power Act of 1920 thus represents the culmination of many different pressures. Technological advances made it imperative that huge water-

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[166] Act of August 8, 1917, ch. 49, 40 Stat. 250, 269. *See* Starr, *supra* note 36, at 180; Walker & Cox, *Jurisdiction of the Federal Power Commission over Non-Power Water Uses*, 5 Land & Water L. Rev. 65, 73-74 (1970).

[167] Act of June 10, 1920, ch. 285, § 29, 41 Stat. 1077.

[168] *See, e.g.*, 16 U.S.C. § 797(a) (1970).

works be designed to perform several functions."[10] The federal government was becoming more involved in the construction of major water projects, and American entry into World War I precipitated projects such as the provision of water power for the munitions complex built during World War I on the Tennessee River near Muscle Shoals, Alabama.[11] The water resources, including the inherent water power, controlled by the Government were increasingly seen as a valuable asset to be exploited in a way that would benefit the public by insuring the self-sufficiency of projects and maximum use of public resources.

Accordingly, the Federal Water Power Act undertook to regulate the nonfederal exploitation of the nation's water power resources and the disposition of excess federally controlled water or water power. Section 4(e) assures maximum utilization of water resources for navigation, water power, and other beneficial uses by providing for the licensing, in accordance with § 10(a), 16 U.S.C. § 803(a),[12] of nonfederal construction and operation of water power projects on navigable waters, public

[10] *See* Fly, *supra* note 31, at 287-88.

[11] *See Ashwander v. TVA*, 297 U.S. 288 (1936).

[12] 16 U.S.C. § 803(a) (1970) provides:

> All licenses issued under sections 792, 793, 795-818, and 820-823 of this title shall be on the following conditions:
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> (a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

lands, or reservations, and for the licensing of the nonfederal use either of water impounded by a Government dam in excess of the amount needed to accomplish the purpose of the dam or of actual hydroelectricity generated by a Government dam and not required for governmental purposes.

We are persuaded that the "surplus water" provision was intended to serve broader interests than the "constructing, operating, and maintaining" clause, which was intended only to regulate nonfederal hydroelectric projects. It reflects an explicit concern with utilizing water resources to defray the cost of waterway improvements as well as a concern with comprehensive water resource management. It empowers the FPC to license the use of either "surplus water" or "water power" from *any* Government dam, and thus is not limited to the mere leasing of excess Government water power. It is interesting to observe that three months before the Act was finally passed, Congress amended the Reclamation Act to authorize the Secretary of Interior "to enter into contract to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper . . . ." [172] Since Congress was obviously concerned with maximizing the public benefit from Government waterworks, the inference arises that the addition of the words "surplus water" in § 4(d) of the Federal Water Power Act was intended to afford the FPC a broad licensing authority
[1241] over federally controlled waters comparable to that afforded the Secretary of Interior in reclamation projects. The FPC could license either the use of "water power" —*i.e.*, electricity actually generated by the Government —or the use of "surplus water" for the private generation of water power or other purposes. This would obvi-

[172] Act of February 25, 1920, ch. 86, 41 Stat. 451, codified in 43 U.S.C. § 521 (1970).

ate the previous necessity of providing in specific acts relating to specific projects, that surplus water could be leased for power purposes and would also take account of the expanding governmental involvement in water resource use and development.

This interpretation, which gives effect to the literal language of § 4(e), is strengthened, somewhat paradoxically, by developments subsequent to the passage of the Federal Water Power Act that diluted Commission authority. In 1928, Congress passed the Boulder Canyon Project Act, 43 U.S.C. §§ 617-617u (1970), which authorized the first federal large-scale multiple-purpose project on a major waterway. The Act authorized the construction of what ultimately became Hoover Dam and other works, for purposes of flood control, navigation, and reclamation, and for generating electricity to make the project self-sufficient financially.[173] The Secretary of the Interior was empowered to contract for the storage and delivery of water "for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which . . . will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under" the Act.[174] Under 43 U.S.C. § 617e. the Secretary of the Interior is authorized to lease units of any Government power plant of the project, with the right to generate electricity, and to lease "the use of water for the generation of electrical energy," in conformity with the requirements of the Federal Power Act and the rules and regulations of the Federal Power Commission. These provisions, although

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[173] *See* 43 U.S.C. §§ 617, 617e (1970).

[174] 43 U.S.C. § 617d (1970).

seemingly ousting the FPC of direct authority over the surplus water and water power of what would be a "Government dam" under the Federal Power Act, indicate the breadth of congressional concern with federal management of federal property to promote efficient water resource utilization. In 1933, the Tennessee Valley Authority was created to undertake duties in the Tennessee River basin comparable to those of the Secretary of Interior under the Boulder Canyon Project Act.[175] Under 16 U.S.C. § 831i, the T.V.A. is given the authority to sell the surplus power generated by it and not needed in its own operations.[176] Under the 1936 and 1944 Flood Control Acts, the Department of the Army is empowered to build and control dams and other improvements for purposes of flood control and navigation. 33 U.S.C. §§ 701 et seq. (1970). The Secretary of the Army is empowered to contract with states, municipalities, private concerns, and individuals "for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army . . . ."[177]

Acts such as these obviously cut into FPC authority to regulate the utilization of surplus water or power, and it is apparent that in every case involving a contention of the applicability of the "surplus water" clause, the FPC will have to consider the interrelationship of its
[1242] enabling act and the scope of the authority of the Government agency responsible for the particular Government dam.[178] But it is also apparent that Congress has for a long time been concerned with the controlled dis-

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[175] Act of May 18, 1933, ch. 32, 48 Stat. 58, *as amended*, 16 U.S.C. §§ 831-31dd (1970).

[176] *See Ashwander v. TVA*, 297 U.S. 288 (1936).

[177] 33 U.S.C. § 708.

[178] *Cf. United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953).

position of surplus federal water and power, and has often expressed this concern by granting plenary control over such disposition to a federal agency. We believe the "surplus water" provision of the Federal Power Act to be but an early manifestation of that concern. At a minimum, Congress surely intended to give the FPC control over the use of surplus waters for the generation of power, no matter by what mechanical force the electricity is ultimately produced.[179]

Accordingly, we hold that the Commission erred in dismissing petitioners' complaint, and we remand to the Commission to consider the surplus water claim. We do not decide whether the FPC does have jurisdiction over the four plants alleged to be the beneficiaries of Government surplus water by virtue of their being downstream from Government dams because we have no record on which to base such a determination.[180] We hold only that the Commission does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants, and we leave to the Commission to determine in the first instance whether the plants involved in this appeal fall within the category asserted by petitioners. In determining this question, the Commission should also consider whether any jurisdiction it might have under the Federal Power Act is affected in any way by the jurisdiction of any other federal agency.

Remanded to the Federal Power Commission for further proceedings not inconsistent with this opinion.

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[179] It has been argued that the "surplus water" clause empowers the FPC to license nonpower uses of surplus federally controlled water. *See* Walker & Cox, *supra* note 166, at 70-75.

[180] *Cf. California Oregon Power Co. v. FPC*, 239 F.2d 426, 432 (D.C. Cir. 1956).

[Filed November 21, 1973]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-2012

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

ARIZONA PUBLIC SERVICE COMPANY,
SAN DIEGO GAS & ELECTRIC COMPANY,
UTAH POWER & LIGHT COMPANY,
DEPARTMENT OF WATER & POWER OF THE CITY OF L.A.,
EL PASO ELECTRIC COMPANY,
NEVADA POWER COMPANY,
SALT RIVER PROJECT AGRICULTURE IMPROVEMENT &
POWER DISTRICT,
SOUTHERN CALIFORNIA EDISON COMPANY,
TUCSON GAS & ELECTRIC COMPANY, *Intervenors*.

Petition of Indicated Intervenors for Rehearing and Suggestion for En Banc Consideration Thereof

Pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure, indicated Intervenors * (Intervenors) hereby request rehearing of this Court's opinion of November 9, 1973, in the above-captioned proceeding. In view of the exceptional importance of this case to the electric utility industry in the United States, Intervenors, pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, suggest that *en banc* consideration may be appropriate.

There were two issues involved in this opinion. The first was whether the Federal Power Commission has jurisdiction to require licenses for steam electric generating plants if such plants use water from navigable streams of the United States. This Court held that the Commission does

* Names of individual Intervenors and counsel are set forth at the end of this petition.

not have such jurisdiction and Intervenors respectfully agree with this holding.

However, there was a second issue decided by this Court, which Intervenors contended in briefs was not properly before the Court, and this involved the question of whether Section 4(e) of the Federal Power Act empowers the Commission to issue licenses "for the purpose of utilizing the surplus water or water power from any Government dam. . . ." The opinion stated (page 75) that "We hold only that the Commission does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants, and we leave to the Commission to determine in the first instance whether the plants involved in this appeal fall within the category asserted by petitioners." It is to this holding of general jurisdiction over "surplus water" to which this petition for rehearing is addressed.

THIS COURT SHOULD AWAIT FURTHER PROCEEDINGS AT THE FEDERAL POWER COMMISSION BEFORE ISSUING A GENERAL RULING ON "SURPLUS WATER"

On appeal, Intervenors (and the Commission) argued that the Commission does not have licensing jurisdiction over "surplus water"*, and, in addition, Intervenors argued (and the Commission to a more limited extent) that the issue of "surplus water" was not properly before this Court because it was not specifically urged in the complaint to the Commission and in the application for rehearing. We will not repeat these arguments here.

Hence, assuming that the general issue of "surplus water" jurisdiction was properly before this Court, Intervenors respectfully request that the Court withdraw its finding that Section 4(e) of the Federal Power Act "empowers the FPC to license the use of surplus water by steam plants" (Opinion, pp. 61, 75) and defer a holding on this issue until it has had the benefit of the Commission's findings after further proceedings.

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* In this petition "surplus water" means "surplus water from a Government dam."

A. Awaiting the Commission's Determination on this Issue Cannot Delay the Case

Having held that the Federal Power Act gave the Commission jurisdiction to license "surplus water", the case was remanded to the Commission to determine "in the first instance whether the plants involved in this appeal fall within the category asserted by petitioners." (p. 75).

In addition, the Commission was directed to "consider whether any jurisdiction it might have under the Federal Power Act is affected in any way by the jurisdiction of any other federal agency." (p. 75). This was doubtless a reference to the statement at page 74 of the opinion that "Acts such as [the Boulder Canyon Project Act; act authorizing Tennessee Valley Authority and Flood Control Acts] obviously cut into FPC authority to regulate the utilization of surplus water or power, and it is apparent that in every case involving a contention of the applicability of the 'surplus water' clause, the FPC will have to consider the interrelationship of its enabling act and the scope of the authority of the Government agency responsible for the particular Government dam."

Thus, because in this case "the FPC will have to consider" the question of what authority it has, if any, over the Government dams involved as well as the issue of whether "surplus water" is affected, there can be no final determination of any of Complainants' specific rights until there is an order in the remanded proceedings. Accordingly, if the Commission also considers the basic issue of whether the Federal Power Act gives it any jurisdiction whatsoever over "surplus water" it could not result in any significant delay. In addition, as will be pointed out, the Commission's findings on this issue can be of great value to this Court.

B. The Issue of "Surplus Water" is Important Enough to Deserve the Fullest Possible Consideration

The opinion held that Congress in 1920, when it passed the Federal Water Power Act, intended to give the Commission jurisdiction over "surplus water". Yet, 53 years

later, such jurisdiction never has been exercised and the Commission still maintains that it has no such jurisdiction. Surely, overturning so many years of practice requires the fullest possible consideration. The opinion itself admits that there is "little in the way of extrinsic illumination of congressional purpose", no judicial precedent, or useful legislative history to support Commission jurisdiction over "surplus water". The Court's holding which is "piece[d] together" from "little extrinsic assistance" merely "tends" to support Commission jurisdiction (p. 64):

> "Second, unlike the situation with respect to the 'constructing, operating, and maintaining' clause, there is little in the way of extrinsic illumination of the congressional purpose in enacting the 'surplus water' clause. There is no judicial decision on its scope; the FPC decisions quoted above interpret the clause in the context of proposed hydroelectric developments; and there apparently is no useful legislative history. What little extrinsic assistance we have been able to piece together, however, tends to show that the language of the 'surplus water' clause does indeed mean what it says." (footnote omitted)

The issue of "surplus water" jurisdiction which can affect numerous steam electric plants * located throughout the nation is too important to be decided on a little extrinsic assistance which has been pieced together if further assistance can be obtained from the Commission. It would certainly seem appropriate to use the services of an agency as experienced as the Commission to give the question of "surplus water" jurisdiction the fullest possible consideration.**

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* Intervenors understand that many steam electric plants use cooling water that might be interpreted to be "surplus water" from a Government dam.

** An example of the assistance that the Commission may render this Court is a consideration of just what constitutes "surplus water". The opinion suggests that "surplus water" may be any water not used for irrigation (p. 62). We submit this is far too broad a definition and probably was not intended by the Court.

C. The Issue of "Surplus Water" Has Not Been Adequately Considered in this Proceeding

As previously pointed out, Intervenors and the Commission (regarding four of the six plants) maintained that the issue of "surplus water" was not properly raised before the Commission and, hence, was not reviewable by the Court under Section 313(b) of the Federal Power Act. This Court apparently decided that under the circumstances of the case no purpose would be served in dismissing the appeal on this issue because Complainants could file an amended complaint (footnote 45, page 61). Perhaps so, but it is clear from reading the Commission's order dismissing the complaint that the Commission gave the "surplus water" issue little, if any, consideration. As a result, it was not sufficiently briefed before this Court. This issue deserves the fullest consideration by the Commission and prior to this Court's opinion it had not been given such consideration.

WHEREFORE, because of the importance of the general "surplus water" issue and the assistance that the Commission can render in a determination of it, it is respectfully requested that this petition for rehearing be granted either by the panel or *en banc*.

Respectfully submitted,

/s/ PEYTON G. BOWMAN III
Peyton G. Bowman III

Harry A. Poth, Jr.
Richard M. Merriman
Peyton G. Bowman, III
Reid & Priest
1701 K Street, N.W.
Washington, D.C. 20006
Counsel for Indicated Intervenors

[Filed November 23, 1973]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-2012

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

ARIZONA PUBLIC SERVICE COMPANY, ET AL.,
DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,
UTAH POWER AND LIGHT COMPANY,
SAN DIEGO GAS & ELECTRIC COMPANY, *Intervenors*

Respondent's Petition for Rehearing and Suggestion for Rehearing En Banc

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure respondent hereby moves for rehearing and suggests rehearing *en banc* of Part III of this Court's opinion in *The Chemehuevi Tribe of Indians et al.*, v. *F.P.C.*, CADC No. 71-2012, issued November 9, 1973.

SUMMARY OF ARGUMENT

The Court erroneously held that the "surplus water" clause of "§ 4(e) empowers the FPC to license the use of surplus water by steam plants" (fossil-fuel and nuclear) (slip opinion p. 61). The six plants in question all take water from or downstream from a Government dam built and operated by the U.S. Bureau of Reclamation. Under general provisions of Reclamation law, water from a Reclamation dam can only be obtained by contract with the Secretary of the Interior. Therefore, with regard to the six plants there can be no FPC licensing of "surplus water" for use in a thermal powerplant. The principle of the Court's holding is troublesome even though there is no "surplus water" for the six projects to utilize. One hundred and ninety-three other thermal electric plants are situated on or downstream from Government dams. If the

Court's rationale prevails the Commission may be forced to make "surplus water" determinations for each of the 193 plants and for plants now under construction or to be constructed.

All the waters in question can only be disposed of by contracts of the Secretary of the Interior. There is no surplus water to be licensed at the 6 plants.

As indicated in Intervenors' oral argument to the Court, their memorandum of October 2, 1972, to the Court and in the annexed letter from the Solicitor of the Department of the Interior to the Chairman of the Federal Power Commission only the Secretary of the Interior can dispose of the water from Government dams to the six plants at issue. The San Juan, Navajo, Kaiparowits, and Mohave plants take all of their water from or downstream from a U.S. Bureau of Reclamation dam under contract with the Secretary of the Interior. The Four Corners and Huntington Canyon plants depend on cooling water from tributary streams purchased from private parties under New Mexico and Utah law. A more recent compilation of water rights appears as Appendix A to Solicitor Frizzell's letter. Therefore, all six plants named in petitioner's complaint cannot utilize cooling water subject to FPC control by virtue of the "surplus water" clause of § 4(e).

In addition to the general provisions of Reclamation law there are numerous Congressional enactments and court decisions that demonstrate indisputably that Congress has given the Secretary of the Interior extraordinary authority over the allocation and use of the waters of the Colorado River Basin. See Solicitor Frizzell's letter attached hereto.

The surplus water question is moot for the six thermal plants complained of by petitioners because the Secretary has the exclusive right to allocate all available water. However, if the Court's theory is not vacated, at a minimum, the Commission will potentially have to make a surplus water determination for one hundred and ninety-three fossil-fueled and nuclear plants which now use cooling

water taken directly from or taken downstream from a Government dam.[1]

Section 6 of the Flood Control Act of 1944 (33 U.S.C. § 708) expressly authorized the Secretary of the Army to enter into contracts for the use of "surplus water" from reservoirs under the control of the Secretary of the Army for domestic and industrial use (slip opinion p. 74). Accordingly, it would again seem, as with Reclamation projects that there would be no "surplus water" subject to license under the Court's reading of § 4(e).

The "surplus water" rationale of the Court should apply only in the context of hydroelectric licensing. If Congress wanted the Commission to license the surplus water used by thermal plants it would have explicitly provided for such Commission licensing in the laws authorizing the construction of the Government dams.

§ 4(e) covers one subject matter, FPC licensing of water power projects. The Supreme Court's opinion in the *Taum Sauk* case (*FPC* v. *Union Electric Company* 381 U.S. 90 (1965)) recognized that all of Part I, including § 4(e), was limited to water power (381 U.S. 90, 110):

> . . . Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission.

The Court's opinion gives proper weight to *Taum Sauk* in Part II A (slip opinion pages 43-47) but the Court

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[1] The Commission's Bureau of Power has utilized its five regional offices in Atlanta, Chicago, Fort Worth, New York, and San Francisco to enumerate the 193 fossil-fuel and nuclear plants having a total installed capacity of almost 90,000,000 kilowatts. Fifteen of the plants use water from a United States Bureau of Reclamation (U.S.B.R.) dam. One hundred and thirty-eight use water from a Corps of Engineers (C.E.) dam. Thirty-two plants use water from a stream downstream from U.S.B.R. and C.E. dams. Seven plants use water from a stream downstream from U.S.B.R., C.E., and T.V.A. dams. One plant uses water from an International Boundary and Water Commission dam.

fails to apply *Taum Sauk* in its discussion of the "surplus water" clause of § 4(e). We contend the same Congressional purpose to cover hydroelectric plants and *not* steam plants applies to all of § 4(e).

The term "surplus water" is not defined in the Federal Power Act. In over 53 years the Federal Power Commission has never issued a license based on the surplus water clause of § 4(e). The Court concedes that there is no prior judicial interpretation of the "surplus water" clause (slip opinion p. 64). *California Oregon Power Company* (slip opinion fn. 147) was in the context of a proposed water power development. In that instance this Court found ample justification for Commission licensing based on the use of navigable waters and held the "surplus water" issue was not ripe for judicial review. *California Oregon Power Co.* v. *F.P.C.*, 99 App DC 263, 267, 239 F.2d 426, 430 (1956).

To support its sweeping "surplus water" gloss, the Court relies on two elements: statutory construction of the "surplus water" clause in § 4(e) and a broad Congressional policy of maximizing revenues from the sale of surplus water to help defray the cost of waterway improvement (slip opinion p. 68). The Court's "surplus water" rationale depends in part on other statutes other than the Federal Water Power Act of 1920 and the Federal Power Act of 1935. We submit that the meaning of the surplus water clause in § 4(e) should turn on the legislative purposes of the Federal Water Power and Federal Power Acts.

Reclamation enactments authorizing the construction of Federal dams are invariably detailed specific statutes.[2] Where Congress legislates in detail with great particularity broad interpretative powers associated with generalized statutes cannot be implied. *Addison* v. *Holly Hill Fruit Products*, 322 US 607, 616-617 (1944).

Each of the Federal dam construction laws referred to in footnote [2], (bottom of this page) authorizes a specific Fed-

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[2] See for example:

Boulder Canyon Project Act, 43 U.S.C. 617-617u.
Colorado River Basin Project Act, 43 U.S.C. 1501-1556.
Columbia Basin Project, 16 U.S.C. 835-835i.
Colorado River Storage Project, 43 U.S.C. 620-620o.
Hungry Horse Dam, 43 U.S.C. 593a-593b.

eral official to dispose of the project waters for specified purposes, or as specified in the Reclamation laws. None of these laws make any reference to FPC fixing rates applicable to the sale of "surplus water". In the past when Congress wanted the FPC to review the rates set by the Federal marketing officials for power generated at a Government dam it so specified in those laws.[3]

Conclusion

For the foregoing reasons it is respectfully submitted that the Court should grant rehearing and we suggest rehearing *en banc* since this "proceeding involves a question of exceptional importance" in the Administration of the Federal Power Acts and other Federal statutes.

Respectfully submitted,

Leo E. Forquer
General Counsel

George W. McHenry, Jr.
Solicitor

Daniel Goldstein
Assistant General Counsel

Lois D. Cashell
Attorney for Respondent

Federal Power Commission
Washington, D.C. 20426
386-4513

November 23, 1973

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[3] Bonneville Project Act, 16 U.S.C. 832, 832e.
Fort Peck Project Act, 16 U.S.C. 833, 833d.
Flood Control Act of 1944, 16 U.S.C. 825s.
Eklutna Project Act, section 2, 64 Stat. 382-383 (1950).
Falcon Dam Act, 68 Stat. 255-256 (1954).

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D. C. 20240

November 21, 1973

Honorable John N. Nassikas
Chairman, Federal Power Commission
Washington, D. C. 20426

Re: The Chemehuevi Tribe of Indians, et al. v. Federal Power Commission, U.S.C.A. for D.C. Circ., No. 71-2012

Dear Mr. Chairman:

We strongly urge that you petition the Court for rehearing on Part III of its decision of November 9 in the *Chemehuevi* case. In that part, the court remanded to the Commission the petitioners' application concerning the six[1] steam generating plants to determine whether they in fact are "the beneficiaries of Government surplus water" and if so, whether "any jurisdiction [the Commission] might have under the Federal Power Act is affected in any way by the jurisdiction of any other federal agency."

The opinion recognizes that the "surplus water" issue was something of an afterthought and that the court was not fully informed about the factual and legal ramifications of the subject. Had the full story been developed, it would have been readily apparent that with respect to the six named plants in the Colorado River Basin at least, there is no "surplus water" available from any Government dam,

[1] The inference that only four plants are involved on remand is raised by the reference in the penultimate paragraph of the opinion to "four plants alleged to be the beneficiaries of Government surplus water by virtue of their being downstream from Government dams". However, the later reference in the paragraph to "the plants involved in this appeal", and the discussion on pages 60-61 and in footnote 145, suggest that the court intended the remand to include all six plants.

and moreover, the Congress has granted the Secretary of the Interior the exclusive jurisdiction to dispose of water from the relevant Government dams for cooling and other industrial purposes. Accordingly, if this information is submitted to the court at this time, it is to be hoped that the court will withdraw the remand and enter a final order of dismissal, and thereby avoid an unnecessary expenditure of time, effort, and money by the petitioners, the Commission, the intervenors, and this Department.

The supply of surface water is exceedingly limited in the Colorado River Basin and is far short of potential demand. Every gallon of water is claimed. Disputes over the allocation of waters have reached the Supreme Court on at least four separate occasions. *Arizona* v. *California*, 283 U.S. 423 (1931); *United States* v. *Arizona*, 295 U.S. 174 (1935); *Arizona* v. *California*, 298 U.S. 558 (1936); *Arizona* v. *California*, 373 U.S. 546 (1963), 376 U.S. 340 (1964) (decree). The allocation of the waters of the river is the subject of two interstate compacts—the Colorado River Compact, I F. Recl. & R.L.A. 441,[2] and the Upper Colorado River Basin Compact, 63 Stat. 31, II F. Recl. & R.L.A. 909, and a treaty with Mexico—the 1944 Mexican Water Treaty, 59 Stat. 1219, II F. Recl. & R.L.A. 750. Any water which remains in the bed of the Colorado River at the Mexican border is committed to fulfilling the obligation of the United States under the treaty to deliver 1,500,000 acre feet of water per year to Mexico. Thus, there is no "unused" water in the river downstream of any or all Government dams, as there was in the *California Oregon Power Company* case upon which petitioners and the court rely.[3] Opinion, pages 62-63.

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[2] "Federal Reclamation and Related Laws Annotated", Government Printing Office, 1972.

[3] Furthermore, there is a significant distinction between utilizing water for hydroelectric power generation, which is an instream non-consumptive use, and for thermal cooling, which is an offstream consumptive use.

Each of the downstream or upstream Government dams upon which petitioners might base their "surplus water" argument is a dam built and operated by the Secretary of the Interior as part of a reclamation project under the Reclamation Act of 1902, 32 Stat. 388, I F. Recl. & R.L.A. 31, as amended and supplemented.[4] The Act of February 25, 1920, 41 Stat. 451, 43 U.S.C. 521, I F. Recl. & R.L.A. 251, expressly authorized the Secretary to contract to supply water from reclamation projects for miscellaneous purposes other than irrigation, provided that the deliveries under the contract are not detrimental to the use of project water for irrigation. Revenues from the sale of such water are covered in the reclamation fund and placed to the credit of the project from which such water is supplied.

The authority in the 1920 Act for the sale of water from reclamation reservoirs for beneficial consumptive uses in addition to irrigation was reinforced by section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(c), I F. Recl. & R.L.A. 647. Many reclamation project authorizing acts also contain specific reference to this purpose. The Water Supply Act of 1958, 72 Stat. 319, 43 U.S.C. 390b, II F. Recl. & R.L.A. 1426, is available for application to reclamation projects as well as to projects of the Corps of Engineers.

These various authorities form the statutory basis for the very extensive program of the Bureau of Reclamation of selling water for municipal and industrial use. As well as providing an important use of water from reclamation reservoirs, this "M&I" program also is an important source of revenues that assists in the repayment of project costs.

In the 17 states in the arid West in which the Reclamation program is carried out, water is at a premium. The

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[4] See Appendix A, attached hereto.

central purpose of the program is to capture water that might otherwise be lost, store it, and devote it to beneficial purposes, both consumptive and non-consumptive. All water available for consumptive use for irrigation and for municipal and industrial water supply purposes is available only pursuant to a contract with the Secretary of the Interior. Thus, there is no "surplus water" available from a reclamation project for steam plant cooling or other industrial use. The court itself recognized this when it stated on page 72 that the authority given the FPC in section 4(e) is "comparable to that afforded the Secretary of the Interior in reclamation projects."

In addition to the general provisions of Reclamation law relating to all reclamation projects, there are a number of specific statutory provisions relating to the Government dams involved in this proceeding that expressly reinforce the conclusion that further proceedings on remand would be a futility. Thus, as far as the Mohave plant is concerned, section 5 of the Boulder Canyon Project Act provides that no water can be taken from the mainstream of the Lower Colorado River except pursuant to a contract with the Secretary. Accord: *Arizona* v. *California*, 373 U.S. 546, 579-80 (1963), 376 U.S. 340 (1964) (decree). With respect to the Four Corners and San Juan plants, which take their water supply from the San Juan River, the only Government dam upstream is the Navajo Dam. Section 11 of the Act of June 13, 1962, expressly provides that no water can be utilized from the Navajo Reservoir except under a contract with the Secretary of the Interior, and no such contract shall be entered into for non-irrigation use until Congress has approved it. 76 Stat. 99, 43 U.S.C. 615ss, III F. Recl. & R.L.A. 1663. The contracts for the water supply for the San Juan plant and for future units of the Four Corners plant were specifically approved by Public Law 90-272, 82 Stat. 52. The three remaining plants, Navajo, Kaiparowits, and Huntington Canyon, involve a storage unit or a participating project of the

Colorado River Storage Project. In addition to the various provisions of the project authorizing act relating to the allocation and disposition of project water, the Colorado River Basin Project Act, P.L. 90-537, 82 Stat. 885, contains a number of further provisions relating to the Storage project. Thus, section 303(d) provides that the water supply for the Navajo plant will be charged to Arizona's apportionment under the Upper Colorado River Basin Compact; section 601(b)(2) requires the Secretary to condition all contracts for the delivery of water from the Colorado River system upon the availability of water under the Colorado River Compact; and section 602 requires the adoption of operating criteria for the storage units of CRSP which may affect water availability.

We note in passing that the possibility that there would be a dam anywhere in the United States from which there is "surplus water" such that the FPC would have licensing jurisdiction of offstream consumptive uses today is very remote. The opinion recognizes that Congress has removed FPC authority over dams built and operated by the Secretary of the Interior under the reclamation laws, by TVA, and by the Corps of Engineers. Opinion, pages 72-74. This eliminates most if not all Government dams from the coverage of the Federal Water Power Act with responsibility to protect the public interest assigned to these other Federal agencies.

You may wish to attach this letter to your petition for rehearing.

Sincerely yours,

/s/ KENT FRIZZELL
Solicitor

Enclosure:
Appendix A

APPENDIX A

Relevant Government Dams and Water Supply Contracts

The Mohave plant is on the mainstream of the Colorado River below Davis Dam. This dam was authorized by the Secretary in 1941 under the provisions of section 9 of the Reclamation Project Act of 1939, 53 Stat. 1193, 43 U.S.C 485h, I F. Recl. & R.L.A. 643. Appropriations to construct it were contained in the Interior Department Appropriations Act, 1942, 55 Stat. 336, I F. Recl. & R.L.A. 716. Article 12 of the Mexican Water Treaty obligated the United States to construct Davis Dam to regulate the delivery of water to Mexico, II F. Recl. & R.L.A. 760. Water for the Mohave plant is furnished from Hoover Dam under Contract No. 14-06-300-1876 of October 26, 1966, with the Colorado River Commission of Nevada, and Contract No. 14-06-300-1877 of the same date between the Colorado River Commission and the Southern California Edison Company. Hoover dam was authorized by the Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. 617 et seq., I F. Recl. & R.L.A. 414.

The Four Corners plant receives water for the existing units 1 through 5 from natural flow of the San Juan River under New Mexico Permit 2838, dated October 10, 1958. Water is available from the Navajo Reservoir for additional units under Contract No. 14-06-400-4831 with the Utah Construction and Mining Company, now identified as Utah International, Inc.; however, the company is considering converting the use of the water to coal gasification. The Navajo Dam was authorized by the Colorado River Storage Project Act, 70 Stat. 105, 43 U.S.C 620 et seq., II F. Recl. & R.L.A. 1248.

The San Juan plant receives its water from the San Juan River based on storage releases from the Navajo Reservoir under Contract No. 14-06-400-4821 dated April 11, 1968, with the Public Service Company of New Mexico.

The Navajo plant received stored waters from Glen Canyon Dam under Contract No. 14-06-400-5033 dated January 17, 1969, with the Salt River Project Agricultural Improvement and Power District. Glen Canyon Dam also was authorized as part of the Colorado River Storage Project.

The Kaiparowits plant was proposed for location near Lake Powell to receive stored water from Glen Canyon Dam under Contract No. 14-06-400-5139 dated October 2, 1969, with the Resources Company, Associated Southern Investment Company, and New Albion Resources Company. However, the Secretary has denied the right-of-way for the plant site pending additional review of several plant sites.

The Huntington Canyon plant receives water from Huntington Creek based on private water rights and on water from the Emery County Project under Contract No. 14-06-400-5906 dated November 17, 1972, with the Utah Power and Light Company and the Emery Water Conservancy District. The Emery County Project is a participating project of the Colorado River Storage Project.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-2012

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Intervenors*.

Motion for Clarification of Opinion

Petitioners respectfully request this Court to modify its opinion of November 9, 1973, in order to clarify the ambiguity concerning whether the Federal Power Commission's licensing jurisdiction extends to the Navajo and Kaiparowits power plants, and the nature of the Commission's duties on remand. The petitioners wish to emphasize the limited nature of the relief sought in this motion. They do not quarrel with the Court's view of the law, or any of the substantive statements in its opinion. Nor do they dispute the propriety of the remand procedures for the four other power plants involved in this appeal. They merely ask this Court to clarify the ambiguity regarding the status of the Navajo and Kaiparowits plants so that the petitioners, the Commission, and the intervenors can be sure of precisely what procedures are to be employed concerning the licensing of those two plants.

Some portions of the opinion would indicate that FPC jurisdiction over the two plants exists, and thus, on remand, the FPC should begin licensing proceedings pursuant to 16 U.S.C. § 797 and 18 C.F.R. §§ 1.20, 1.6 and 4.30 *et seq.* For example, the opinion states: "We agree that § 4(e) empowers the FPC to license the use of surplus water by steam plants, and accordingly we remand to the Commission for consideration of petitioners' 'surplus

water' claim." (p. 61) Also, "At a minimum, Congress surely intended to give the FPC control over the use of surplus waters for the generation of power, no matter by what mechanical force the electricity is ultimately produced." (p. 75)

But language in the last paragraph of the opinion, and in footnote 145, could be read in such a way as to leave the question of jurisdiction over Navajo and Kaiparowits open, to be determined on remand by the Commission. In the last paragraph on page 75, the Court declines to decide whether there is jurisdiction over the other four power plants involved in this appeal because there is no record on which to base such a determination. But the next sentence is somewhat obscure: "[W]e leave to the Commission to determine in the first instance whether *the plants involved in this appeal* fall within the category asserted by petitioners." The underscored language could be construed to mean that the Commission now must consider "in the first instance" whether there is jurisdiction over *all six* plants involved in this case, not just the four "downstream" plants. Similarly, in footnote 145, the Court indicates the Commission will consider the "downstream" claim "in the first instance just as it will consider the primary 'surplus water' claim." It could be argued that the "primary" surplus water claim at Navajo and Kaiparowits could still be dismissed by the Commission on the ground that its jurisdiction is pre-empted by the Department of the Interior under the Colorado River Storage Project Act, 43 U.S.C. §§ 620 *et seq.* As the petitioners show below, this argument is untenable. But its apparent plausibility could well result in an erroneous FPC decision that the two plants are non-jurisdictional.

The issue of jurisdiction over Navajo and Kaiparowits, unlike the downstream plants, presents no questions of fact within the expert province of the FPC. Instead, this is a purely legal question, turning on the interrelationship between two possibly conflicting statutes. As the Supreme

Court remarked in *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970), when "the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of [an agency], but by judicial application of canons of statutory construction."

Considerations of equity and sound judicial administration dictate that this ambiguity be resolved now, by this panel. When the petitioners filed their complaint in September, 1971, construction at the Navajo site was in its initial stages. Now, more than two years later, construction is nearly complete. If the issue of jurisdiction is not clearly settled now, and on remand the Commission decides it has no jurisdiction, a second appeal to this Court is inevitable. By the time the question is decided, the first unit at Navajo will be in operation.[1] Thereafter, any consideration of the environmental impact of the plant in a licensing proceeding, as required by the cases cited in the Court's opinion at page 58, would be little more than "*pro forma* ritual."[2]

This Court has recognized the danger of an agency's putting off consideration of environmental impact until after a facility is completed. In *Calvert Cliffs' Coordinating Comm.* v. *AEC*, 146 U.S. App. D.C. 33, 449 F.2d 1109 (D. C. Cir. 1971), Judge Wright emphasized the need for the AEC to consider the environmental impact of atomic power plants under NEPA at the pre-construction licensing stage, rather than after the date of completion:

> The special importance of the pre-operating license stage is not difficult to fathom. In cases where environmental costs were not considered in granting a construction permit, it is very likely that the planned

---

[1] Unit 1 at Navajo is scheduled to go on line in May, 1974. Bureau of Reclamation, Environmental Impact Statement: Navajo Project, p. ii (Feb. 1972).

[2] *Calvert Cliffs' Coordinating Comm.* v. *AEC*, 146 U.S. App.D.C. 33, 449 F.2d 1109, 1128 (D.C. Cir. 1971).

> facility will include some features which do significant damage to the environment and which could not have survived a rigorous balancing of costs and benefits. At the later operating license proceedings, this environmental damage will have to be fully considered. But by that time the situation will have changed radically. Once a facility has been completely constructed, the economic cost of any alteration may be very great. In the language of NEPA, there is likely to be an "irreversible and irretrievable commitment of resources," which will inevitably restrict the Commission's options. Either the licensee will have to undergo a major expense in making alterations in a completed facility or the environmental harm will have to be tolerated. It is all too probable that the latter result would come to pass. 449 F.2d at 1128.

A remand to the Commission on the issue of jurisdiction at Navajo and Kaiparowits would result in an unnecessary waste of the resources of the FPC and this Court since, as noted above, a second appeal from the Commission's ruling would then be inevitable. That second appeal would be heard by a new panel, which would not have available to it the expertise this panel has built up in this area. Furthermore, Judge McCree, the opinion's author, would not be available to clarify its meaning.

The petitioners can conceive of only one possible interpretation of the Court's opinion that could lead the Commission to conclude it lacks jurisdiction of the two plants. Such an interpretation would rely on the language describing the interrelationship of the authority of the FPC and other government agencies:

> Acts such as these obviously cut into FPC authority to regulate the utilization of surplus water or power, and it is apparent that in every case involving a contention of the applicability of the "surplus water" clause, the FPC will have to consider the interrelationship of its enabling act and the scope of the authority of the Government agency responsible for the particular Government dam. But it is also apparent that Congress has for a long time been con-

> cerned with the controlled disposition of surplus federal water and power, and has often expressed this concern by granting plenary control over such disposition to a federal agency. We believe the "surplus water" provision of the Federal Power Act to be but an early manifestation of that concern.
>
> • • • •
>
> We hold only that the Commission does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants, and we leave to the Commission to determine in the first instance whether the plants involved in this appeal fall within the category asserted by petitioners. In determining this question, the Commission should also consider whether any jurisdiction it might have under the Federal Power Act is affected in any way by the jurisdiction of any other federal agency. (Opinion, pp. 74-75)

It could be argued that, under this language, the Commission's jurisdiction over the use of surplus water from Lake Powell was ousted by the Colorado River Storage Project Act, 43 U.S.C. §§ 620 *et seq.* by granting plenary authority over the water impounded by the Glen Canyon Dam in Lake Powell to the Interior Department. Section 620 provides in pertinent part:

> In order to initiate the comprehensive development of the water resources of the Upper Colorado River Basin, for the purposes, among others, of regulating the flow of the Colorado River, storing wat[illegible] for beneficial consumptive use, making it possible [illegible]e states of the Upper Basin to utilize . . . the ap[illegible]onments made to and among them in the Colorado River Compact and the Upper Colorado River Basin Compact respectively, providing for the reclamation of arid and semiarid land, for the control of floods, and for the generation of hydroelectric power, as an incident of the foregoing purposes, the Secretary of the Interior is authorized to construct, operate, and maintain . . . [the] Glen Canyon [Dam] . . . .

In fact, a statute giving broad powers to regulate water use in another federal agency does not divest the Commis-

sion of licensing jurisdiction over private power facilities within that watershed. In *Nantahala Power & Light Co.* v. *FPC*, 384 F.2d 200 (4th Cir. 1967), the Court held the FPC had jurisdiction over private power developments in the Tennessee Valley, even though the Tennessee Valley Authority was granted, by statute and agreement, a far wider water management discretion than under the Colorado River Storage Project Act. 16 U.S.C. §831y-1 provided that, "The unified development and regulation of the Tennessee River System requires that no dam, appurtenant works, or other obstruction, affecting navigation, flood control or public lands or reservations shall be constructed . . . in the said river or any of its tributaries until plans for such construction . . . shall have been submitted to and approved by the Board. . . ." Pursuant to that statute, the private developers had entered into the "Fontana Agreement," giving the TVA the right to control the impounding and releasing of water at the developments and making all energy generated at the plants available to the TVA. The Court concluded that an interpretation of the statute and agreement that would eliminate FPC jurisdiction would be "shocking indeed."

> It would, in effect, exempt from the Power Act's licensing requirements all developments in the Tennessee River system, for anyone wishing to construct a power facility in the Tennessee River watershed must first obtain approval of the governing Board for a plan of operation that will harmonize the activities of the facility with those of other developments in the Tennessee River system. All owners would be freed from regulation except to the limited extent outlined in agreements similar to the Fontana Agreement, which is solely concerned with the "coordinated operation of power facilties" in the Tennessee River system. The Commission, whose interests are broader than those of the TVA, and certainly no less important, would be precluded from implementing needed improvements or modifications consistent with the *national* interest. 384 F.2d at 213.

Similarly, in the present case, leaving sole control of the use of Lake Powell water for power plant cooling with the Interior Department would mean that the "national interest" in environmental protection, which the FPC could otherwise protect, would go unrecognized.

The Court also rejected Nantahala's contention that permitting FPC licensing would "subject it to two masters, who may not always see eye to eye," noting that such potential conflicts could be worked out by agreement. 384 F.2d at 213-214.

It is apparent that Congress did not intend to immunize private appropriators of surplus water from Lake Powell from FPC licensing jurisdiction. When Congress meant to do so, it said so in specific terms, as in the Boulder Canyon Project Act, 43 U.S.C. §§ 617-17u, cited by the Court at page 73 of its opinion. Significantly no such language appears in the Colorado River Storage Project Act.

Petitioners therefore urge this Court to clarify its opinion by indicating that the Commission should immediately begin licensing proceedings for the Navajo and Kaiparowits power plants.

Respectfully submitted,

/s/ Joseph J. Brecher
Joseph J. Brecher

David H. Getches
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

L. Graeme Bell, III
Native American Rights Fund
1712 N Street, N.W.
Washington, D. C. 20036

Dated: November 23, 1973

[Filed November 30, 1973]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-2012

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

ARIZONA PUBLIC SERVICE COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, UTAH POWER & LIGHT COMPANY, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES, EL PASO ELECTRIC COMPANY, NEVADA POWER COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT, TUCSON GAS & ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, *Intervenors*.

Petition for Rehearing, or in the Alternative a Suggestion for Reconsideration En Banc of the Department of Water and Power of the City of Los Angeles, Intervenor

The Department of Water and Power of the City of Los Angeles, Intervenor, supports the position taken by the Federal Power Commission in its Petition for Rehearing, and the letter of the Solicitor of the Department of the Interior to the Chairman of the Commission, November 21, 1973, thereto annexed. We join in the request for rehearing by the Court en banc, because of the importance of the issues decided.

In addition, we respectfully invite the Court's attention to the following points which affect the Department of Water and Power of the City of Los Angeles.

The Department of Water and Power has an ownership interest in two of the power plants involved in this litigation: the Mohave and Navajo.

The Mohave plant, located below Davis Dam, utilizes water which is stored by Hoover Dam and delivered by the United States pursuant to contract of the Secretary of the Interior made under the authority of the Boulder Canyon Project Act (45 Stat. 1057).

The Navajo power plant (not to be confused with the projects which use the word "Navajo" in New Mexico) is

located in Arizona, and is supplied water by the United States from Lake Powell, the reservoir created by Glen Canyon Dam, pursuant to contract of the Secretary of the Interior in exercise of the authority delegated to him by the Colorado River Basin Project Act of 1968 (82 Stat. 885).

1. *With respect to the Mohave power plant* (which uses water stored by Hoover Dam, pursuant to contract of the Secretary of the Interior made under Section 5[1] of the Boulder Canyon Project Act), the opinion and decree of the United States Supreme Court in *Arizona* v. *California* (373 U.S. 546 (1963), decree 376 U.S. 340 (1964)) are dispositive of this case for two reasons:

A. The Court held that federal authority with respect to the use of all waters stored by Hoover Dam is vested by the Boulder Canyon Project Act (45 Stat. 1057) in the Secretary of the Interior. Waters can only be used pursuant to contracts made by the Secretary pursuant to Section 5 of that act (Art. II(B)(5). His authority is thus exclusive. He has exercised that authority by a contract which controls in all respects the use of water by the Mohave power plant. An attempted exercise of licensing authority by the Federal Power Commission would violate the injunction, directed to all federal officials, by Article II of the decree.

B. The water rights of Indian reservations, being "present perfected rights" (Art. I(G), (H) of the decree) are decreed priorities,[2] which insulate them completely from any shortage of supply occasioned by consumption by others of waters stored by Hoover Dam. Shortages, if any, must be borne by water users whose water rights are junior to those present perfected rights. Consumption of

---

[1] Section 5 of the Boulder Canyon Project Act, authorizing contracts to be made by the Secretary of the Interior for the use of water stored by Hoover Dam, provides: "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

[2] Chemehuevi, Art. II(D)(1); Cocopah, Art. II(D)(2); Yuma, Art. II(D)(3); Colorado River, Art. II(D)(4); Fort Mohave, Art. II(D)(5).

water by the Mohave plant pursuant to contract of the Secretary is thus not actionable by any Indian tribe having present perfected rights so decreed.

2. *With respect to the Navajo power plant* (which uses water apportioned by the Colorado River Compact to the Upper Basin, stored by Glen Canyon Dam, pursuant to contract with the Secretary of the Interior):

A. A federal statute (Sec. 303 of the Colorado River Basin Project Act of September 30, 1968, 82 Stat. 885) specifically authorized federal participation in the financing of this power plant, and required that its construction, operation, and disposition of energy (including energy for pumping water in the Central Arizona Aqueduct authorized by Section 301 of that act) shall conform to a plan to be formulated by the Secretary and reported to Congress. The Secretary carried out this mandate. Congress, having considered his plan, appropriated money[3] to fund the federal share of the cost of this power plant and appurtenant works. The Secretary's authority so delegated and confirmed was and is exclusive of the licensing authority of the Federal Power Commission.

B. The Colorado River Compact, in Article III(a), apportions to the Upper Basin and the Lower Basin, respectively, the *exclusive* beneficial consumptive use of 7.5 million acre-feet annually of the waters of the Colorado River System. The Compact thus denies to water users in the Lower Basin (including Indian tribes) a cause of action with respect to uses of water in the Upper Basin, such as the consumption of water by the Navajo power plant (and other Upper Basin plants involved in this litigation), within the quantity so apportioned, so long as the States of the Upper Division perform their obligation to deliver stated quantities of water to the Lower Basin at Lee Ferry pursuant to Articles III(d) and (e) of the Colorado River Compact. There has been no default in this delivery obligation. The federal legislation which authorized the Navajo power plant (supra) directed (Sec. 303(d)) that its use of water be charged against Arizona's share of water apportioned by the Colorado River Com-

[3] $149.5 million to date.

pact to the Upper Basin (of which the Upper Colorado River Basin Compact, in turn, apportioned to Arizona 50,000 acre-feet of annual consumptive use). Use of water by the Navajo plant, being within the quantity apportioned to the Upper Basin by Article III(a) of the Colorado River Compact and not in diminution of the flow guaranteed to the Lower Basin by Artiele III(d) and (e) thereof, is not actionable by any water user in the Lower Basin, including Indian tribes.

In conclusion:

Whatever the Federal Power Commission's licensing authority may be elsewhere, it has no such authority with respect to the Mohave and Navajo power plants. As the Federal Power Commission is without jurisdiction, no purpose would be served by remanding this case to it.

We believe this to be true also with respect to the other power plants involved in this litigation, for reasons stated in the Federal Power Commission's petition for rehearing, but the Department of Water and Power of the City of Los Angeles has no ownership interest in those other plants, and does not presume to argue the case on their behalf.

Respectfully submitted,

THE DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES

By BURT PINES, City Attorney

EDWARD C. FARRELL,
Chief Assistant City Attorney for Water and Power

RALPH GUY WESSON,
Assistant City Attorney

/s/ NORTHCUTT ELY
Northcutt Ely
Special Counsel,
Watergate 600 Building
Washington, D. C. 20037

November 30, 1973

[Filed December 7, 1973]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1973

No. 71-2012

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

ARIZONA PUBLIC SERVICE COMPANY
SAN DIEGO GAS & ELECTRIC COMPANY
UTAH POWER & LIGHT COMPANY
DEPARTMENT OF WATER AND POWER OF THE CITY OF L.A.
EL PASO ELECTRIC COMPANY
NEVADA POWER COMPANY
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
& POWER DISTRICT
SOUTHERN CALIFORNIA EDISON COMPANY
TUCSON GAS & ELECTRIC COMPANY, *Intervenors*

Before: WRIGHT and TAMM, Circuit Judges; and McCREE*, United States Circuit Judge for the Sixth Circuit

Order

On consideration of Intervenors' Arizona Public Service Company, El Paso Electric Company, Nevada Power Company, Salt River Project Agricultural Improvement and Power District, San Diego Gas & Electric Company, South-

* Sitting by designation pursuant to Title 28, U.S.C. § 291(a).

ern California Edison Company, Tucson Gas & Electric Company, and Utah Power & Light Company, petition for rehearing, it is

ORDERED by the Court that Intervenors' aforesaid petition for rehearing is denied.

Per Curiam

For the Court:

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

[Filed December 7, 1973]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1973

No. 71-2012

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

ARIZONA PUBLIC SERVICE COMPANY
SAN DIEGO GAS & ELECTRIC COMPANY
UTAH POWER & LIGHT COMPANY
DEPARTMENT OF WATER & POWER OF THE CITY OF L.A.
EL PASO ELECTRIC COMPANY
NEVADA POWER COMPANY
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT
SOUTHERN CALIFORNIA EDISON COMPANY
TUCSON GAS & ELECTRIC COMPANY

Before: Wright and Tamm, Circuit Judges; and McCree*, United States Circuit Judge for the Sixth Circuit

Order

On consideration of Respondent's petition for rehearing, it is

ORDERED by the Court that Respondent's aforesaid petition for rehearing is denied.

Per Curiam

For the Court:

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

---

* Sitting by designation pursuant to Title 28, U.S.C. § 291(a).

[Filed December 11, 1973]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1973

No. 71-2012

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

ARIZONA PUBLIC SERVICE COMPANY
SAN DIEGO GAS & ELECTRIC COMPANY
UTAH POWER & LIGHT COMPANY
DEPARTMENT OF WATER & POWER OF THE CITY OF L.A.
EL PASO ELECTRIC COMPANY
NEVADA POWER COMPANY
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
& POWER DISTRICT
SOUTHERN CALIFORNIA EDISON COMPANY
TUCSON GAS & ELECTRIC COMPANY

Before: Wright and Tamm, Circuit Judges; and McCree*, United States Circuit Judge for the Sixth Circuit

Order

On consideration of Petitioners' motion for clarification of this Court's opinion of November 9, 1973, it is

ORDERED by the Court that the aforesaid motion is denied.

Per Curiam

For the Court:

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

* Sitting by designation pursuant to Title 28, U.S.C. § 291(a).

[Filed December 19, 1973]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1973

No. 71-2012

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

ARIZONA PUBLIC SERVICE COMPANY
SAN DIEGO GAS & ELECTRIC COMPANY
UTAH POWER & LIGHT COMPANY
DEPARTMENT OF WATER & POWER OF THE CITY OF L.A.
EL PASO ELECTRIC COMPANY
NEVADA POWER COMPANY
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
& POWER DISTRICT
SOUTHERN CALIFORNIA EDISON COMPANY
TUCSON GAS & ELECTRIC COMPANY, *Intervenors*

Before: Wright and Tamm, Circuit Judges; and McCree*, United States Circuit Judge for the Sixth Circuit

Order

On consideration of the Petition for Rehearing, or in the alternative a suggestion for reconsideration *en banc* of the Department of Water and Power of the City of Los Angeles, Intervenor, it is

ORDERED by the Court that Intervenor's aforesaid petition is denied.

Per Curiam

For the Court:

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

* Sitting by designation pursuant to Title 28, U.S.C. § 291(a).

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 10, 1974

Northcutt Ely, Esq.
Watergate Six Hundred Bldg.
Suite 915
Washington, D. C. 20037

RE: Chemehuevi Tribe of Indians v. Federal Power Comm'n., No. 73-1380;
Arizona Pub. Service Co. v. Chemehuevi Tribe of Indians, No. 73-1666;
Federal Power Comm'n. v. Chemehuevi Tribe of Indians, No. 73-1667

Dear Mr. Ely:

The Court today took the following action in the above cases:

"The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,

MICHAEL RODAK, JR., *Clerk*
By /s/ HELEN K. LOUGHRAN
(Mrs.) Helen K. Loughran
Assistant Clerk

Encls.

THE RIGHT TO FILE AN OPPOSITION TO THE PETITION WAS WAIVED BY THE RESPONDENTS.

Supreme Court, U. S.
FILED
AUG 9 1974
MICHAEL RODAK, JR., CLERK

BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1380

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

No. 73-1666

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Petitioners*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

No. 73-1667

FEDERAL POWER COMMISSION, *Petitioner*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

Petitions for Certiorari Filed March 11, 1974, and May 6, 1974
Certiorari Granted June 10, 1974

BRIEF OF
ARIZONA PUBLIC SERVICE COMPANY, ET AL.

(See list of attorneys on inside cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

NORTHCUTT ELY
FREDERICK H. RITTS
Law Offices of Northcutt Ely
Watergate 600 Building
Washington, D. C. 20037
and
HARRY A. POTH, JR.
PEYTON G. BOWMAN, 3RD
Reid & Priest
40 Wall Street, New York,
N.Y. 10005

1701 K Street, N. W.
Washington, D. C. 20006
Attorneys for all Petitioners

NICHOLAS H. POWELL
Snell & Wilmer
400 Security Building
Phoenix, Arizona 85004
Attorneys for Arizona Public Service Company

WILLIAM DUNCAN
Kemp, Smith, White, Duncan & Hammond
P. O. Box 2800
El Paso, Texas 79999
Attorneys for El Paso Electric Company

BURT S. PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power

RALPH GUY WESSON
Assistant City Attorney
111 North Hope Street
Los Angeles, California 90051
Attorneys for Department of Water and Power, City of Los Angeles

M. GENE MATTEUCCI
P. O. Box 230
Las Vegas, Nevada 89101
Attorney for Nevada Power Company

REX E. LEE
2840 Iroquois Drive
Provo, Utah 84601
Jennings, Strouss & Salmon
111 W. Monroe Street
Phoenix, Arizona 85003
Attorneys for Salt River Project Agricultural Improvement and Power District

SHERMAN CHICKERING
C. HAYDEN AMES
EDWARD P. NELSEN
ALLAN J. THOMPSON
Chickering & Gregory
111 Sutter Street
San Francisco, California 94104
Attorneys for San Diego Gas & Electric Company

JOHN R. BURY
Assistant General Counsel
P.O. Box 800
Rosemead, California 91770
Attorney for Southern California Edison Company

L. V. ROBERTSON, JR.
General Attorney
Tucson Gas and Electric Company
220 West Sixth Street
Tucson, Arizona 87503

DONALD E. DICKERMAN
Holesapple, Conner, Jones, McFall & Johnson
P.O. Box 310
Tucson, Arizona 85702
Attorneys for Tucson Gas & Electric Company

SIDNEY G. BAUCOM
ROBERT GORDON
P. O. Box 899
Salt Lake City, Utah 84110
Attorneys for Utah Power & Light Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1380

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

No. 73-1666

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Petitioners*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

No. 73-1667

FEDERAL POWER COMMISSION, *Petitioner*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

Petitions for Certiorari Filed March 11, 1974, and May 6, 1974
Certiorari Granted June 10, 1974

BRIEF OF ARIZONA PUBLIC SERVICE COMPANY, ET AL.

OPINIONS BELOW

The opinion of the court below is that of the United States Court of Appeals for the District of Columbia Circuit in *Chemehuevi Tribe of Indians, et al.* v. *Federal Power Commission*, 489 F.2d 1207 (D.C. Cir. 1973), *rehearing denied* December 7, 1973, and Decem-

ber 19, 1973, on a petition of Chemehuevi Tribe of Indians, et al., for review of orders of the Federal Power Commission in Docket No. E-7664, dated November 4, 1971 (reported at 46 F.P.C. 1120), and December 10, 1971 (reported at 46 F.P.C. 1307).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the court of appeals was founded on Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*. Its judgment was entered November 9, 1973.

On June 10, 1974, the Supreme Court granted the petition for certiorari of these petitioners in *Arizona Public Service Co., et al.* v. *Chemehuevi Tribe, et al.*, No. 73-1666, the petition of the Federal Power Commission in *Federal Power Commission* v. *Chemehuevi Tribe, et al.*, No. 73-1667, and the cross-petition of the Chemehuevi Tribe, et al., in *Chemehuevi Tribe, et al.* v. *Federal Power Commission*, No. 73-1380, and ordered the three cases consolidated.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a justiciable case or controversy is presented, and, in particular:

A. Whether legislation delegating to the Secretary of the Interior all federal authority with respect to the consumptive use of waters of the Colorado River System supplied from government dams has superseded Section 4(e) of the Federal Power Act with respect thereto, if that section was ever applicable to such uses, thereby rendering moot the court of appeals interpretation of Section 4(e) as requiring Federal Power Commission licenses for the use of such waters by the steam-electric generating plants involved in this case.

B. Whether the complainants lack standing to litigate the issue of whether the Secretary of the Interior or the Federal Power Commission has jurisdiction to license the consumptive use of water from government dams in the Colorado River Basin.

If, as we believe, no justiciable case or controversy is presented, this Court may properly reverse and vacate the judgment below as an advisory opinion, inasmuch as the question of construction of Section 4(e) need not have been reached.

Otherwise the issues encompass:

2. The question presented by the petition for a writ of certiorari of the Chemehuevi Tribe of Indians, et al., in No. 73-1380:

"Whether the court below properly construed the term 'project works' in Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), to be limited to hydroelectric plants, thereby excluding fossil-fueled thermal-electric plants from the licensing authority of the Federal Power Commission."

We would answer this in the affirmative.

3. The question presented in our petition in No. 73-1666:

"Whether Section 4(e) of the Federal Power Act (16 U.S.C. Sec. 797(e)), which authorizes the Federal Power Commission to issue a license 'for the purpose [*inter alia*] of utilizing the surplus water or water power from any Government dam,' requires that a license be obtained for the use of water by thermal electric generating plants solely for boiler and cooling purposes, as contrasted with the use of water or water power for hydroelectric power generation."

We would answer this in the negative, as the Solicitor General answered a similar question in his petition.

As all of these are issues of law, remand to the Commission for further determinations, ordered by the court of appeals, is not warranted.

PROVISIONS OF STATUTES AND INTERSTATE COMPACTS

Relevant extracts from the statutes and compacts involved are printed as Attachment A to this brief. They are:

Sections 4(e), 10(e) and 23 of the Federal Power Act, 16 U.S.C. §§ 797(e), 803(e), 817.

Sections 5 and 6 of the Boulder Canyon Project Act, 43 U.S.C. § 617d, e.

Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c).

Section 4 of the Colorado River Storage Project Act, 43 U.S.C. § 620c.

Sections 11(a), (b), 13(a), (b), 14 of the Navajo-San Juan Chama Project Act, 43 U.S.C. §§ 615ss (a), (b), 615uu(a), (b), 615vv.

Act of March 22, 1968, Pub.L. 90-272; 82 Stat. 52; U.S. Code Cong. & Admin. News at 63 (1968).

Sections 301(b), (c), and 303(a), (b), (c), (d) of the Colorado River Basin Project Act, 43 U.S.C. §§ 1521 (b), (c), 1523(a),(b),(c),(d).

Articles III(a), (d), (e), and VIII of the Colorado River Compact, H.R.Doc. 717, 80th Cong., 2d Sess. A19, A21 (1948).

Article III(a) of the Upper Colorado River Basin Compact, H.R. Doc. 717, 80th Cong., 2d Sess. A169 (1948).

STATEMENT OF THE CASE

1. Summary

The Chemehuevi and Cocopah Tribes of Indians, alleging ownership of water rights in the Colorado River, joined by others who did not assert such ownership, filed a complaint with the Federal Power Commission, asking that the Commission exercise licensing jurisdiction under Section 4(e) of the Federal Power Act over six steam-electric generating plants, in four States, which utilize waters of the Colorado River System in their boilers and for cooling purposes. The complaint alleged that these plants are "project works" along navigable waters, that they also utilize "surplus" waters from government dams, and that Section 4(e) of the Act confers licensing jurisdiction over steam-electric generating plants in such circumstances. The Commission, sua sponte, dismissed the complaint for lack of jurisdiction over steam plants, holding (as it had for more than a half-century) that its jurisdiction under Part I of the Act is limited to hydroelectric projects. The court of appeals, while agreeing with the Commission that Section 4(e) of the Act does not extend the Commission's licensing jurisdiction to steam-electric generating plants as "project works" in consequence of their use of waters of a navigable stream, nevertheless held that this section does confer licensing jurisdiction on the Commission with respect to utilization by steam plants of "surplus water . . . from any Government dam" for such purposes. It remanded the case to the Commission to determine whether the water used in the six steam-electric generating plants involved here is "surplus water," and whether any jurisdiction that the Commission might have is affected in any way by the jurisdiction of any other federal agency. It did not define the term "surplus water."

The uses of water (that the court of appeals said may be "surplus water . . . from any Government dam") made by these plants in boilers and cooling systems are "consumptive uses," that is, the quantity returned to the stream is less than the quantity diverted.[1] The consumptive use of water is to be distinguished from non-consumptive uses, *e.g.*, in the generation of hydroelectric power.

These six thermal plants consume waters of the Colorado River System in conformity with the "Law of the River," *i.e.*, the apportionments of consumptive use made in the Colorado River Compact, the Upper Colorado River Basin Compact, the Mexican Water Treaty, the decree of this Court in *Arizona* v. *California, et al.*, 376 U.S. 340 (1964), and several federal statutes, discussed in Part I of this brief, which delegate to the Secretary of the Interior, exclusively, all federal authority with respect to the consumptive use of all water stored by government dams in the Colorado River Basin. The plants which use water supplied from government dams do so pursuant to contracts with the Secretary made under the authority of those statutes.

Although the court below referred to the six power plants collectively as "the Four Corners plants," the distance between the Mohave Plant and the Four Corners Plant, 375 miles, is about equal to the distance between Washington and Toronto. A map, Item 4 of the separately printed Supplement to this brief, illustrates the large distances involved.

In more detail:

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[1] Arizona v. California, 373 U.S. 546, 557, n. 23 (1963). The quantity thus "permanently withdrawn" is quoted by the court of appeals (App. 52) from our adversaries' brief in the court of appeals as aggregating 250,000 acre-feet annually.

2. The complaint filed with the Federal Power Commission

On September 10, 1971, the Chemehuevi Tribe of Indians, et al.[2] (Complainants), filed with the Federal Power Commission a Complaint, Petition for Order to Show Cause and Request for Expedited Procedure, against Arizona Public Service Company, et al.,[3] asking the Commission to assert licensing jurisdiction under Part I of the Federal Power Act[4] over six planned or existing steam-electric generating plants in the Southwest which consume waters of the Colorado River System in their boilers and for cooling purposes[5] (App. 1).

3. The Power Plants Involved

Water for consumption in boilers and cooling systems is supplied to the Mohave Plant, in southeastern Nevada, from Hoover Dam; to the Navajo Plant, in

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[2] The Cocopah Tribe of Indians, the Sierra Club, Committee to Save Black Mesa, Emma Yazzie, Jimmie Yazzie, Paul Begay, Chester Hugh Benally, and Ben Begay.

[3] Ten "complainees" were named: Arizona Public Service Company, Southern California Edison Company, Salt River Project Agricultural Improvement and Power District, Tucson Gas & Electric Company, El Paso Electric Company, Nevada Power Company, Utah Power & Light Company, Department of Water and Power of the City of Los Angeles, San Diego Gas & Electric Company, Public Service Company of New Mexico.

[4] 16 U.S.C. §§ 792-823. Part I, captioned "Regulation of the Development of Water Power and Resources," was enacted in 1920 as the Federal Water Power Act.

[5] The power plants are identified at pp. 7-9, *infra*, and, with the federal contracts involved, are described in Item 2 of the Supplement to this brief, which reproduces the findings of fact in Jicarilla Apache Tribe of Indians, et al. v. Morton, et al., 3 ERC 1919 (D. Ariz. 1972), *aff'd*, 471 F.2d 1275 (9th Cir. 1973), a case in which all of the complainants (respondents) except the Chemehuevi and Cocopah Tribes were parties. See also Yazzie, et al. v. Morton, et al., 59 F.R.D. 377 (1973). Plant ownerships, as among the petitioners, are tabulated in Item 3 of the Supplement. Item 4 is a location map.

northern Arizona, and the (proposed) Kaiparowits Plant in southern Utah, from Lake Powell, the reservoir created by Glen Canyon Dam; to the Huntington Plant, in Utah, from a Reclamation reservoir on a tributary of the Colorado River; to the San Juan Plant, in northwestern New Mexico, from the Navajo Dam; to the Four Corners Plant, in northwestern New Mexico, from the San Juan River.

Each plant which uses water supplied from a government dam does so pursuant to a contract with the Secretary of the Interior,[6] made under statutes which specify that no water stored by such a dam may be used except by contract with the Secretary. Five of the six plants are in this category, although one of them, Huntington, also uses water appropriated under the laws of Utah from the natural unregulated flow of certain streams. The sixth plant, Four Corners, uses water under appropriations from the natural unregulated flow of the San Juan River made under the laws of New Mexico prior to the authorization of any government dam on that stream.[7]

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[6] Certified copies of water contracts have been filed with the Court.

[7] The findings of fact in *Jicarilla*, Supp. at 94s-128s, state, with reference to the Four Corners Plant:

> ". . . Water for use of Units 1-5 (about 51,600 acre-feet annually) is obtained from the San Juan River under diversion rights granted by the New Mexico State Engineer in 1955. A water service contract approved by Congress was executed by the Secretary of the Interior in April 1968 with Utah Mining and Construction Company for 44,000 acre-feet of water from the Navajo Reservoir, a Bureau of Reclamation facility, for possible future development of coal resources."

Counsel are advised, however, that no use of water by the Four Corners Plant or any other power plant has been made under that contract.

The six power plants are expected to supply 22% of the power requirements of consumers in the States of Arizona, California, Nevada, Utah, New Mexico, and Texas, in 1980.[8]

The locations of the plants are shown on the map, Item 4 of the Supplement to this brief. They are described in general terms in the court of appeals opinion (App. 41-43), and in greater detail in the findings of fact in *Jicarilla Apache Tribe of Indians, et al.* v. *Morton, et al.*, 3 ERC 1919 (D. Ariz. 1972), *aff'd*, 471 F.2d 1275 (9th Cir. 1973), reproduced as Item 2 of the Supplement to this brief.[9] Their ownerships are tabulated in the Supplement, Item 3.

All of the power plants are also the subject of contracts between their owners and the Secretary of the Interior involving one or more of the following: use of federal land, Indian land, federal ownership participation (in one plant, Navajo), coal rights, easements, and rights-of-way.[10] The extensive federal involvement with each of these plants, including the Secre-

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[8] *Problems of Electrical Power Production in the Southwest*, S. REP. No. 92-1015, 92d Cong., 1st Sess. at 48 (1972).

[9] The plants were the subject of congressional oversight hearings, *Problems of Electric Power Production in the Southwest, Hearings Before the Senate Comm. on Interior and Insular Affairs*, Parts 1-7, 92d Cong., 1st Sess. (1971), a Senate report, S. REP. No. 92-1015, 92d Cong., 1st Sess. (1972), and the DEPARTMENT OF THE INTERIOR, SOUTHWEST ENERGY STUDY, SUMMARY REPORT (1972).

[10] A summary of these contracts, as of 1972, can be found in S. REP. No. 92-1015, 92d Cong., 1st Sess., at pp. 102-110 (1972). Another listing can be found in *Problems of Electrical Power Production in the Southwest, Hearings before the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess., Part 6, at 1961-70 (1971).

tary's authority with respect to pollution control, is set forth in the findings of fact in the *Jicarilla* case. (Supplement, Item 2).

4. The Complainants

The complainants are:

(1) The Chemehuevi Tribe of Indians, whose reservation is in California, some 110 miles below Hoover Dam, 40 miles from the nearest power plant, Mohave, 385 miles from the most distant, Huntington, 365 miles from Four Corners. Its water rights were decreed in *Arizona* v. *California, et al.*, 376 U.S. 340 (1964).

(2) The Cocopah Tribe of Indians, residing south of Yuma, Arizona, 235 miles below Hoover Dam, 175 miles from the nearest plant, Mohave, 510 miles from Huntington, 455 miles from Four Corners. Its water rights were also decreed in *Arizona* v. *California*.

(3) The Sierra Club.

(4) The Committee to Save Black Mesa (a source of coal supplied to certain of these plants under contracts made by the Navajo Tribal Council).

(5) Five individuals, members of the Navajo Tribe.

5. The Commission's Order

The Commission, sua sponte, entered an order November 7, 1971 (App. 22), dismissing the complaint for lack of jurisdiction over steam-electric generating plants, citing *FPC* v. *Union Electric Co.*, 381 U.S. 90 (1965). It denied a petition for rehearing December 10, 1971 (App. 28).

6. Opinion of the Court of Appeals

The complainants petitioned the Court of Appeals for the District of Columbia Circuit to review the Commission's orders, under Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).

On November 9, 1973, the court handed down its opinion (App. 38). The court identified two issues (App. 53):

> "Petitioners contend that FPC jurisdiction is properly invoked under § 4(e) of the Federal Power Act for two reasons: either because the six plants identified in the complaint are 'project works' necessary for the development of power along navigable waters or because the plants will utilize 'surplus water' from Government dams."

As to the first ground, the court held that the six plants are not "project works" necessary for the development of power along navigable waters, and accordingly that the "navigable waters" clause of Section 4(e) did not confer licensing authority on the Commission. The court said, *inter alia* (App. 72):

> "The history of the Act shows beyond any doubt that the only segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydroelectric power."

Again (App. 90):

> ". . . Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness."

It might be thought that these conclusions disposed of the entire case.

Not so. Turning to the "surplus water" language of Section 4(e), the court said (App. 97-98):

> "Petitioners contend that two of the Four Corners plants—Navajo and Kaiparowitz [*sic*]—will withdraw water directly from impoundments created by a Government dam, and that the other four plants are downstream from Government dams and will have water available on a dependable basis only because of the 'stream regimen imposed by upstream government dams'. [Footnote omitted.] According to petitioners, these are usages of 'surplus water' that invoke Commission jurisdiction under § 4(e) and require the Commission to regulate the operations of the Four Corners plants. We agree that § 4(e) empowers the FPC to license the use of surplus water by steam plants, and accordingly we remand to the Commission for consideration of petitioners' 'surplus water' claim."

After citing pre-Federal Water Power Act cases involving hydroelectric projects using water diverted from reservoirs created by government dams, the court said (App. 112):

> "... We hold only that *the Commission does have jurisdiction to license the utilization of surplus water*[11] *by thermal-electric generating plants,* and we leave to the Commission to determine in the first instance whether the plants involved in this appeal fall within the category asserted by peti-

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[11] (Our footnote). For examples of the licensing of surplus water for use by hydroelectric power plants, see Green Mountain Power Corp., 13 F.P.C. 1211 (1954) (power plant constructed at government dam); Utah Power & Light Company, 31 F.P.C. 958 (1964) (water diverted by canal from reservoir to private property); Alabama Power Company, 34 F.P.C. 1108 (1965) (power plant constructed at government dam).

> tioners. In determining this question, the Commission should also consider whether any jurisdiction it might have under the Federal Power Act is affected in any way by the jurisdiction of any other federal agency." (Emphasis added; footnote omitted.)

The sentence last quoted reflects the court's awareness, stated earlier in the opinion (App. 94) that:

> ". . . there may be federal legislation peculiarly applicable to the operations of particular power plants, such as the extensive regulation of withdrawals of water from the Colorado River system." [12]

SUMMARY OF ARGUMENT

I.

Although we would welcome a decision on the merits, we feel constrained to place before the Court the considerations which, in our view, lead to the conclusion that the judgment below should be reversed and vacated for lack of a justiciable controversy, inasmuch as (A) legislation subsequent to the Federal Power Act has made Section 4(e), whatever its meaning, inapplicable to the consumptive use of waters of the Colorado River System, and (B) all of the complainants lack standing to litigate the issue which is here for decision, *i.e.*, jurisdiction as between the Secretary of the Interior and the Federal Power Commission.

A.

The decision below, construing Section 4(e) in relation to these six steam plants, was an advisory opinion, not applicable to the case before it.

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[12] See note 14, *infra*, for examples cited by the court.

Congress has delegated to the Secretary of the Interior, to the exclusion of the Federal Power Commission, all federal authority relating to the consumptive use of waters stored by government dams in the Colorado River Basin, impressing thereon the "Law of the River," a complex of compacts, treaty, federal statutes, and court decisions. Use of water in steam-electric generating plants is a consumptive use which, by specific statutory direction, can be supplied from government dams in the Colorado River Basin only pursuant to contract with the Secretary of the Interior, as contrasted with the non-consumptive use of the kinetic energy in falling water by means of hydroelectric projects, left subject to license by the Commission. Thus Congress, by statutes subsequent to the Federal Power Act, has restricted the licensing functions of the Federal Power Commission in the Colorado River Basin to hydroelectric power projects, whatever may be the Commission's functions in other parts of the country. All of the power plants involved here which use water from government dams are supplied that water by the Secretary under his contracts, in obedience to statute. The court of appeals, instead of remanding the case to the Commission to determine whether Congress had delegated authority to dispose of surplus water from government dams in the Colorado River Basin to agencies other than the Federal Power Commission, should have determined, itself, as a matter of law, that Congress has made that delegation to the Secretary of the Interior, and so should have affirmed the Commission's order dismissing the complaint for lack of jurisdiction.

B.

Injury is an essential element of "standing." That element is lacking here.

The only issue requiring decision in the suit brought by these complainants is whether the Secretary of the Interior or the Federal Power Commission shall license the consumptive use of water stored by government dams. No complainant will be affected one way or the other by that decision. The environmental concerns which they voice are not here for resolution. As both the Commission and the Secretary are subject to the same statutory controls relating to protection of the environment, the complainants would have exactly the same remedies, irrespective of whether the Secretary or the Commission should sign the document authorizing the consumptive use of water from these Colorado River dams.

The complainants other than the Chemehuevi and Cocopah Tribes have all been plaintiffs in other unsuccessful suits against these plants, raising environmental issues. Apparently the two tribes have been joined on this occasion because they own water rights in the Colorado River, alone among all the complainants.

But injury to these tribes in their capacity as water users is precluded by the "Law of the River." The decision and decree of this Court in *Arizona* v. *California, et al.*, awarded these tribes "present perfected rights" of such high priority as to protect them totally against shortages occasioned by any other users. Federal legislation implementing that decree made certain that all shortages must be borne by others. Moreover, the de-

cree precludes any complaint by these tribes against consumptive use by the Mohave Plant in Nevada, inasmuch as its use is within the apportionment made by the decree to Nevada. The Colorado River Compact precludes their complaint against consumptive use of water by any of the five plants in the Upper Basin. As no use of water by any of the six plants can cause injury to these tribes, their complaint that such use may cause shortages is moot. Beyond this, the Commission has no jurisdiction to adjudicate water rights either as to quantity or quality of water. Indeed, Article II of the decree in *Arizona* v. *California* enjoins the United States, its officers, attorneys and employees (including, of course, the Federal Power Commission as well as the Secretary) from operating structures or releasing waters otherwise than in accordance with the decree.

If the Court, nevertheless, concludes that it was necessary for the court of appeals to decide the questions of whether Section 4(e) of the Federal Power Act confers licensing jurisdiction on the Federal Power Commission (i) over thermal electric plants as "project works" along navigable waters, or (ii) over the consumptive use by thermal electric plants of waters stored by government dams, then the decision below should be affirmed with respect to the first point, and reversed with respect to the second, for the following reasons:

II.

The rationale of the court's proper conclusion, that the licensing jurisdiction of the Commission over "project works" does not extend to steam plants which use the waters of a navigable stream in their boilers

and cooling apparatus, logically requires the conclusion that its licensing jurisdiction does not encompass the consumptive use of "surplus water . . . from any Government dam" by the same kind of plant from the same stream for these same purposes.

The text of the Act, the 1935 amendments, legislative history, the rationale of this Court's opinion in *FPC* v. *Union Electric Co.*, and 54 years of administrative construction, all require the same conclusion in the one case as in the other.

A.

The language of the Act is wholly devoted to the terminology and problems associated with hydroelectric power. It is totally lacking in criteria and detail which would be necessary to give the Commission guidance if it were expected to license steam power plants, which are never mentioned. Steam-electric power generation cannot be made to fit a statute minutely designed to enhance and regulate the development of another source of energy: the Federal *Water Power* Act, as its authors appropriately named it.

B.

In 1935 Congress made two significant decisions in amending the Federal Water Power Act.

It rejected an amendment which would have given the Commission "certification" authority over electrical production facilities other than hydroelectric projects, *e.g.*, steam-electric generating plants.

At the same time, Congress amended Section 10(f) to provide that where a "project not under license" is benefited by construction by the United States (or an-

other) of a "headwater improvement," the Commission is authorized to require an equitable annual charge to be paid on account of such benefits received by the "unlicensed project." This negates the court's assumption that the use of water in a reach of a stream where the regimen is affected by an upstream government dam is, by hypothesis, use of surplus water from that dam, subjecting the user to the requirement of a license. If the court were right, there could not be an "unlicensed project" in these circumstances.

C.

This Court's interpretation of the Federal Power Act in *FPC* v. *Union Electric Co.* (the *Taum Sauk* case), consistently with earlier cases, has limited the Commission's licensing jurisdiction to the utilization of the power potential in water.

D.

The administrative construction for 54 years has consistently restricted the Commission's licensing jurisdiction to hydroelectric projects, and is entitled to great weight. Congress, with such views before it, has several times amended the Federal Power Act without expressing dissatisfaction with that construction. The Commission, in so advising Congress, has never suggested that its disclaimer applied only to steam plants using navigable waters, whereas steam plants using surplus water from government dams were within its licensing jurisdiction. Instead, it proposed (but without success) legislation that would for the first time (as it said) give it licensing jurisdiction over steam plants.

III.

The legislative history of Section 4(e) of the Federal Power Act is reviewed in detail in Item 1 of the Supplement to this brief, separately bound. This shows unmistakably that the "surplus water" clause, like the "project works" clause, was intended to apply only to hydroelectric projects. The references to steam power were in the context of an unlicensed competitor with hydroelectric projects. No consumptive uses, *e.g.*, irrigation and industrial uses, were to be regulated by the Commission.

The court's assumption that the Waterways Commission which Congress authorized in 1916 was intended to have jurisdiction of some sort with reference to steam plants, and that the repeal of that authorization which was effected by the Federal Power Act was intended to transfer such jurisdiction to the Commission, is refuted by the legislative history of both acts. The Waterways Commission was solely an investigatory agency, with no licensing powers. Steam plants were not even in the statutory inventory of subjects it was to investigate. But, whatever the intended scope of the Waterways Commission's inquiries may have been, the Senate, in approving the Federal Water Power Act, rejected a proposed amendment which would have transferred all the functions of the defunct Commission to the new one. Clearly, the demise of the Waterways Commission did not kindle an implied jurisdiction in the Federal Power Commission that the Federal Water Power Act failed to state and that its legislative history does not suggest.

ARGUMENT

I.

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED AND VACATED FOR LACK OF A JUSTICIABLE CONTROVERSY.

A. The elements of justiciability

The Court, in *Gilligan* v. *Morgan*, 413 U.S. 1, 9-10 (1973), citing *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968), noted particularly three criteria of justiciability:

> "In determining justiciability, the analysis in Flast thus suggests that there is no justiciable controversy (a) when the parties are asking for an advisory opinion, (b) 'when the question sought to be adjudicated has been mooted by subsequent developments,' and (c) 'when there is no standing to maintain the action.' As we noted in Poe v Ullman, 367 U.S. 497 (1961), and repeated in Flast, '[j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . . .'"

By all three of these tests, the case presented by respondents (complainants) fails to present a justiciable case or controversy. They do indeed ask for an opinion that can only be advisory with respect to the meaning of the surplus water clause of Section 4(e), because "subsequent developments," *i.e.*, subsequent acts of Congress, have made that provision inapplicable to the consumptive use of water from government dams in the Colorado River Basin, whatever the scope of that section may be elsewhere. Moreover, all of the complainants lack standing, because none of them alleges an interest which would be affected by the resolution of the question of whether the Secretary of the Interior or the Federal Power Commission has

jurisdiction to control the use of water supplied to steam plants from government dams in the Colorado River Basin. That is the question here for decision.

B. Section 4(e) of the Federal Power Act has no application to the consumptive use of waters of the Colorado River System, having been superseded by legislation which delegates exclusively to the Secretary of the Interior all federal authority relating to the consumptive use of such waters from government dams. He has exercised that authority by his contracts.

1. *The significance of the "Law of the River."*

The Court has before it the question of whether licenses under Section 4(e) of the Federal Power Act are required for six specific steam-electric generating plants which use waters of the Colorado River System. Their use of water is a consumptive use,[13] in boilers and cooling apparatus, as distinguished from the non-consumptive use of the kinetic energy of falling water in hydroelectric generating plants. The decree in *Arizona* v. *California*, 376 U.S. 340 (1964), defined "domestic use" to "include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power," *i.e.*, hydroelectric power. *Id.* at 341 (Article I(I)). This paraphrases Article II(h) of the Colorado River Compact. The use of water by steam plants is an industrial use.

The consumptive use of waters of the Colorado River System is controlled by the "Law of the River," a complex of federal statutes, opinions and a decree of this Court, interstate compacts, the Mexican Water Treaty, and contracts executed by the Secretary which are subject to all of the foregoing.

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[13] Diversions less returns to the river, Arizona v. California, decree, 376 U.S. 340 (1964) (Art. I(A)); opinion, 373 U.S. 546, 557 n. 23 (1963).

The court below conceded (App. 94) that:

> ". . . there may be federal legislation peculiarly applicable to the operations of particular power plants, such as the extensive regulation of withdrawals of water from the Colorado River system." [14]

The court, in our view, should have proceeded to examine the cited statutes, and to determine that they vest exclusive jurisdiction in the Secretary of the Interior to control all consumptive uses of water supplied from government dams, precluding the licensing jurisdiction of the Federal Power Act with respect to consumptive use of waters of the Colorado River System, whatever its jurisdiction may be with respect to steam plants in other basins. It erred, we submit, in proceeding to the interpretation of Section 4(e) with respect to steam plants generally, in a case to which Section 4(e) is not applicable. Its opinion is, therefore, an advisory one.

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[14] The footnote to the quoted sentence (App. 94, n. 135) identifies a number of the elements of the Law of the River:

> "[135] The Colorado River is apportioned between the Upper and Lower Basin states by the Colorado River Compact, *see* 70 Cong. Rec. 324 (1928), and among the states within the basin by the Upper Basin Compact, 63 Stat. 31 (1949), and the Boulder Canyon Project Act, 43 U.S.C. §§ 617-17u (1970). *See* Arizona v. California, 373 U.S. 546 (1963). In times of shortage, the Secretary of the Interior has authority to allocate the waters among the states and among the users of each state, *See* Arizona v. California, *supra*, 373 U.S. at 579-90. Other federal controls over the flow of the river are provided by the Mexican Water Treaty, T.S. 994, 59 Stat. 1219; the Colorado River Storage Project Act, 43 U.S.C. §§ 620-620o (1970); and the Colorado River Basin Project Act, 43 U.S.C. §§ 1501-56 (1970). For a history and discussion of the Colorado River legislation, see H.R. Rep. No. 1312, 90th Cong., 2d Sess. (1968), in 3 U.S. Code Cong. & Ad. News 3666 (1968)."

2. *The Boulder Canyon Project Act,* 43 U.S.C. § 617 et seq.

The statutory pattern of the Law of the River was set by the Boulder Canyon Project Act, 43 U.S.C. § 617 et seq. This statute explicitly vests exclusive authority in the Secretary, not the Federal Power Commission, to control the use of water stored by Hoover Dam not only at the dam, but at all points between the dam and the Mexican border.

Section 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d, provides in part:

> "Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon . . . . Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. *No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.*" (Emphasis added.)

The congressional decision to vest plenary authority in the Secretary, not the Commission, was deliberate. This act ended a contest which had persisted through four Congresses over the development of the water resources of the Lower Colorado River Basin.[15] Power

[15] Bills for construction of the Boulder Canyon Project were introduced in four consecutive Congresses by Congressman Swing and Senator Johnson beginning in 1922. A chronology of this and earlier congressional consideration of the Project is found in *Hearings on the Protection and Development of the Lower Colorado River Basin (H.R. 5773) Before the House Committee on Irrigation and Reclamation*, 70th Cong., 1st Sess., pt. 1, at 8-10 (1928) (statement by Committee Chairman Smith).

development was a major issue. There were members of Congress who believed that private interests should be licensed under the Federal Water Power Act to construct a dam and power plant in Boulder or Black Canyon.[16] Others insisted that the federal government should do so.[17] The latter prevailed.[18] A compromise

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[16] *E.g.*, the discussion of private applications for development of the site in *Hearings on the Protection and Development of the Lower Colorado River Basin (H.R. 11449) Before the House Committee on Irrigation of Arid Lands*, 67th Cong., 2d Sess. 128, 170, 187 (1922), and in *Hearings on the Protection and Development of the Lower Colorado River Basin (H.R. 2903) Before the House Committee on Irrigation and Reclamation*, 68th Cong., 1st Sess. 480, 523 (1924). In a letter dated March 24, 1924, the three members of the Federal Power Commission recommended to the House committee that the Commission should be entrusted with the supervision of the water power aspects of the project. *Id.* at 1002. By the time of final floor debate in 1928, the issue of federal construction of the dam had been resolved, but disagreement continued on whether the power works at the dam site should be federally built or privately built under FPC or Interior license. Senator Hayden offered a floor amendment to make the FPC the licensing authority. 69 CONG. REC. 10275 (1928). His amendment was discussed and offered but never voted upon. *Id.*; 70 CONG. REC. 80 (1928).

[17] *E.g.*, *Hearings on the Lower Colorado River Basin (H.R. 2903) Before the House Committee on Irrigation and Reclamation*, 68th Cong., 1st Sess. 1778-80 (1924) (statement by Congressman Swing). Congressman Davenport offered a floor amendment to insure that the federal government would build the power plant, 69 CONG. REC. 9976-78 (1928), and although the amendment was accepted by the House, it was not part of the Senate substitute bill, 70 CONG. REC. 600 (1928), and was not insisted upon by the House. *Id.* at 831-32.

[18] *Hearings on Boulder Dam (H.R. 9826) Before the House Committee on Rules*, 69th Cong., 2d Sess. 111 (1927) (testimony of Congressman Swing); *Hearings on the Colorado River Basin (H.R. 6251 and H.R. 9826) Before the House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess. 32 (1926) (testimony of Senator Hayden).

proposal that the government build the dam, but license the use of the water power there under the surplus water clause of Section 4(e) of the Federal Water Power Act, was offered by Congressman Leatherwood in the House committee:[19]

> "The Secretary of the Interior is hereby authorized to permit the use of surplus waters, not required for irrigation or domestic uses, by any political subdivisions, or municipal or private corporations, who shall become licensees for the purpose under the Federal water power act, approved June 10, 1920, as provided therein for the use of surplus water at Government dams. The Federal Power Commission is hereby authorized to issue preliminary permits and licenses for the purpose of utilizing the surplus water or water power from said dam . . . ."

The amendment was discussed later by the Irrigation and Reclamation Committee in closed session, where it received only three votes and was defeated.[20] Instead, the Secretary of the Interior was authorized to construct the dam, and, at his option, to construct the power plant and lease it out, or operate it and sell energy therefrom, or to lease out falling water to an entity which might construct the plant. Section 6 of Boulder Canyon Project Act, 43 U.S.C. § 617e.

The Boulder Canyon Project Act contains numerous references to the Federal Power Act, but only for the purpose of assimilating provisions or policies of the

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[19] *Hearings on the Colorado River Basin (H.R. 6251 and H.R. 9826) Before the House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess. 244-48 (1926).

[20] *Hearings on Boulder Dam (H.R. 9826) Before the House Committee on Rules*, 69th Cong., 2d Sess. 38-40 (1927).

Federal Power Act in the authority delegated to the Secretary, not for the purpose of subordinating his contracts to the jurisdiction of the Commission. *E.g.*, Secs. 5(e), 13(e), 43 U.S.C. §§ 617d(e), 617*l*(e).

Amendments made by the Boulder Canyon Project Adjustment Act in 1940, 43 U.S.C. § 618, directed that revenues be deposited in designated funds, for specific purposes.[21]

This Court, in *Arizona v. California*, 373 U.S. 546, 579-80 (1963), said:

> "Having undertaken this beneficial project, Congress, in several provisions of the Act, made it clear that no one should use mainstream waters save in strict compliance with the scheme set up by the Act. Section 5 authorized the Secretary 'under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river . . . as may be agreed upon, for irrigation and domestic uses . . . .' To emphasize that water could be obtained from the Secretary alone, § 5 further declared, 'No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.'
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[21] As will be noted, each of the later Colorado River statutes directs that revenues from disposition of stored water and power accruing to the United States be deposited in special funds related to development of the water resources of the Colorado River Basin. This is in contrast with Section 17 of the Federal Power Act, 16 U.S.C. § 810, which, as amended in 1935, requires that revenues (including those from "surplus water") be allocated to specified funds quite different from those named in the Colorado River legislation.

> "These several provisions, even without legislative history, are persuasive that Congress intended the Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States *and to decide which users within each State would get water.*" (Emphasis added.)

In an earlier *Arizona v. California* case, 298 U.S. 558, 570 (1936), the Court had spoken in the same vein:

> ". . . the United States, by congressional legislation and by acts of its officers which that legislation authorizes, has undertaken, in the asserted exercise of its authority to control navigation, *to impound, and control the disposition of the surplus water in the river not already appropriated.*" (Emphasis added.)

Section 5 of the Project Act is dispositive of the case as to the Mohave Plant. This plant, located downstream from Hoover Dam, uses water pursuant to a contract made under Section 5 of the Project Act. After this Court's decision and decree in *Arizona v. California,* awarding Nevada the consumptive use of 300,000 acre-feet annually and requiring contracts of individual water users with the Secretary, he made his contractual arrangements in two phases, simultaneously, for the supply of water for the Mohave Plant. On October 26, 1966, he contracted with the State of Nevada to deliver from storage in Lake Mead up to 30,000 acre-feet annually for use in this plant for a period of 35 years, the United States to construct the necessary diversion works (Supplement at 101s), and on the same date approved a companion contract between the State and the owners of the plant whereby the State redelivered the same quantities to the plant,

at a slightly higher price. Both contracts contain detailed environmental provisions. (*Id.* at 102s.)

While the Mohave Plant is the only one of the six which receives water under the terms of the Boulder Canyon Project Act, the policy set by that act, of exclusive delegation to the Secretary of all federal authority with respect to consumptive uses of water supplied from government dams, has been followed in the later acts which relate to the use of water by the Upper Basin plants, as we shall see.

3. *The Upper Basin Reservoirs and the steam plants served by them under contracts with the Secretary*

The plants other than Mohave are all in the Upper Basin of the Colorado River. Three storage reservoirs are involved:

(1) Lake Powell, created by Glen Canyon Dam on the main stream, constructed under the authority of the Colorado River Storage Project Act, 43 U.S.C. § 620, et seq., from which water is supplied to the Navajo Plant and will be supplied to the planned Kaiparowits Plant.

(2) Navajo Reservoir, on the San Juan River[22] in New Mexico, which supplies water to the San Juan Plant. The Navajo Dam and reservoir are "participating projects" named in the Colorado River Storage Project Act, *supra,* and, in addition, use of water from that reservoir is controlled by the Navajo-San Juan Chama Project Act, 43 U.S.C. § 615ss(a), (b), which not only requires a contract with the Secretary, but also requires that long-term contracts be approved by special acts of Congress.

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[22] The Four Corners Plant, on the San Juan, uses water pursuant to appropriations of natural flow under the laws of New Mexico.

(3) Joe's Valley Reservoir on Seely Creek, a tributary of the Colorado River in central Utah. The reservoir is a part of the Emery County Project authorized by the Colorado River Storage Project Act. Emery County Project water is available for use at the Huntington Plant pursuant to contract among the Emery Water Conservancy District, United States of America, and Utah Power & Light Company.

Three statutes controlling the use of water from government dams are of general application to reservoirs in the Upper Basin. These are (1) the Colorado River Storage Project Act, 43 U.S.C. § 620, et seq., (2) Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), and (3) certain provisions of the Colorado River Basin Project Act of 1968, 43 U.S.C. § 1501, et seq.

4. *The Colorado River Storage Project Act,* 43 U.S.C. § 620, et seq.

This act authorized the Secretary of the Interior to construct and operate four major dams, with power plants, *i.e.,* Glen Canyon, on the mainstream, Navajo on the San Juan, plus two not involved here, Flaming Gorge and Curecanti, and a number of federal reclamation projects which were named as "participating projects," *i.e.,* participating in revenues from the named power plants in assisting repayment of their costs.[23]

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[23] Section 620d established a separate fund in the Treasury and directed that all revenues be paid into, and be appropriated out of, that fund for the purposes stated in the act, *e.g.,* retirement of the costs of the participating projects as well as the four main dams and power plants. Excess revenues are to be apportioned among the four States of the Upper Division, Colorado, New Mexico, Utah, and Wyoming, in stated percentages.

The act's purposes were stated to include the initiation of "the comprehensive development of the water resources of the Upper Colorado River . . . storing water for beneficial consumptive use," etc. (Sec. 620.) Section 620c provided that "the Secretary shall be governed by the Federal reclamation laws," and that all uses of water should be "subject to the apportionments of the use of water between the Upper and Lower Basins of the Colorado River and among the States of the Upper Basin fixed in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, and to the terms of the treaty with the United Mexican States."

5. *The Colorado River Basin Project Act of 1968*, 43 U.S.C. § 1501, et seq.

Section 1501 declares:

> "(a) It is the object of this Act to provide a program for the further comprehensive development of the water resources of the Colorado River Basin and for the provision of additional and adequate water supplies for use in the upper as well as in the lower Colorado River Basin."

To that end, the act authorizes the construction of the Central Arizona Project, implements the shortage provisions of the decree in *Arizona* v. *California*, authorizes participation by the United States in the cost of the Navajo Power Plant (discussed separately, *infra* at 34), authorizes planning for the importation of water to augment the supplies of the Colorado River Basin, provides for allocation of costs, creates a development fund into which revenues are to be paid and from which expenditures are to be appropriated, and directs the Secretary to make annual reports of consumptive use throughout the Basin.

Section 1551(b)(2) instructs him to

> "condition all contracts for the delivery of water originating in the drainage basin of the Colorado River system upon the availability of water under the Colorado River Compact."

Section 1551(c) provides:

> "(c) All Federal officers and agencies are directed to comply with the applicable provisions of this Act, and of the laws, treaty, compacts, and decree referred to in subsection (a) of this section, in the storage and release of water from all reservoirs and in the operation and maintenance of all facilities in the Colorado River system under the jurisdiction and supervision of the Secretary, and in the operation and maintenance of all works which may be authorized hereafter for the augmentation of the water supply of the Colorado River system."

This mandatory directive is basin-wide, operating in both the Upper and Lower basins.

Section 1552(a) provides:

> "(a) In order to comply with and carry out the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, and the Mexican Water Treaty, the Secretary shall propose criteria for the coordinated long-range operation of the reservoirs constructed and operated under the authority of the Colorado River Storage Project Act, the Boulder Canyon Project Act, and the Boulder Canyon Project Adjustment Act."

These criteria relate to storage of water in the four storage units of the Colorado River Storage Project, and releases from Lake Powell in a listed order of priority. The effect, in general terms, is to require that

storage in Lake Powell and Lake Mead be kept in balance.[24]

Section 1554 says:

> "Except as otherwise provided in this Act, in constructing, operating, and maintaining the units of the projects herein and hereafter authorized, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902; 32 Stat. 388, and Acts amendatory thereof or supplementary thereto) to which laws this Act shall be deemed a supplement."

Section 1555 directs:

> "Part I of the Federal Power Act shall not be applicable to the reaches of the main stream of the Colorado River between Hoover Dam and Glen Canyon Dam until and unless otherwise provided by Congress."

This reach encompasses the damsites of the controversial Hualapai and Marble Canyon hydroelectric power projects.

This act also authorizes construction of five "participating projects" which had been identified earlier in the Colorado River Storage Project Act. The legislative history of the Colorado River Basin Project Act shows that Congress intended that water be supplied to thermal-electric generating plants from these projects, pursuant to contracts with the Secretary of the Interior. See H.R. Rep. No. 1312, 90th Cong., 2d Sess., 3 U.S. Code Cong. & Admin. News 3666 (1968).

We submit that the Colorado River Storage Project Act and the Colorado River Basin Project Act extend

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[24] The operating criteria appear in 35 Fed. Reg. 8951 (1970).

to the entire Colorado River Basin the characterization employed by this Court in the third *Arizona* v. *California* case, 298 U.S. 558, 570 (1936), with respect to the effect of the Boulder Canyon Project Act in the Lower Basin:

> "Without more detailed statement of the facts disclosed, it is evident that the United States, by congressional legislation and by acts of its officers which that legislation authorizes, has undertaken, in the asserted exercise of its authority to control navigation, to impound, and control the disposition of, the surplus water in the river not already appropriated."

This control is explicitly and repeatedly vested in the Secretary, not the Commission.

6. *The Reclamation Project Act of 1939,* 43 U.S.C. § 485.

It was noted above that the Colorado River Storage Project Act, in Section 620c, and the Colorado River Basin Project Act, in Section 1554, directed that, except as otherwise provided, the Secretary shall be governed by the Federal reclamation laws in constructing, operating and maintaining the works authorized. The element of the Reclamation Laws which controls water and power contracts related to reclamation dams is the Reclamation Project Act of 1939.

Section 9(c) of that act, 43 U.S.C. Sec. 485h(c), authorizes the Secretary to enter into contracts "to furnish water for municipal water supply or miscellaneous purposes," [25] and to enter into contracts of "sale of

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[25] "Miscellaneous purposes" has been consistently construed by the Department and Congress to include "industrial purposes," and these, in turn encompass the furnishing of water to thermal-

electric power or lease of power privileges . . . in connection with the operation of any project or division of a project," and specifies minimum revenue requirements, related to operation, maintenance, payment of interest and other fixed charges. It concludes:

> "No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes."

It thus delegates to the Secretary authority in the same field as that covered by the surplus water clause of Section 4(e) of the Federal Power Act, as explained by that section's legislative history (*infra* at 55).

7. *Special legislation relating to the Navajo Plant, on Lake Powell*

The Colorado River Basin Project Act of 1968, 43 U.S.C. § 1523, contained provisions relating particularly to the Navajo Plant. It directed the Secretary to submit to Congress a plan for federal acquisition of an interest in a thermal plant as a source of power for pumping water into and in the Central Arizona Aqueduct, construction of which was authorized by that act, and directed that water used by this plant be debited to the apportionment of 50,000 acre-feet of annual con-

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electric generating plants. *See, e.g.*, Dept. of Interior Memorandum of Associate Solicitor Fisher, October 26, 1956, cited in U.S. DEPT. OF INTERIOR, FEDERAL RECLAMATION AND RELATED LAWS ANNOTATED, VOL. 1, 658, n. 2 (1972) (diversion of water for thermal plant cooling purposes authorized by Reclamation Act of 1939); H.R. REP. No. 1312 (Colorado River Basin Project Act), 90th Cong., 2d Sess. (1968) (discussion of industrial uses of water to be provided by the project included cooling water for power plants at Animas-LaPlata, Dallas Creek and San Miguel).

sumptive use made to Arizona by Article III(a) of the Upper Colorado River Basin Compact, H.R. Doc. 717, 80th Cong., 2d Sess. A169 (1948). The Secretary made the required report September 30, 1969, stating that he intended to acquire 24.3% of the Navajo Plant's capacity for this purpose (Supplement at 106s-108s; 115 CONG. REC. 27585 (1969)). The Secretary, on January 17, 1969, entered into a contract with the Salt River Project Agricultural Improvement and Power District (Supplement at 110s) for water service from Lake Powell for the Navajo Plant, authorizing the diversion of 40,000 acre-feet and consumptive use of 34,100 acre-feet per annum, and in the same year he entered into a "Participation Agreement" with the owners of the plant, acquiring for the United States a 24.3% interest in its capacity for the purposes stated in the Colorado River Basin Project Act. These contracts incorporate detailed environmental controls. (Supplement at 110s). Congress has appropriated $149.5 million through F.Y. 1974, in payment of the federal share (estimated at $200,000,000) of the cost of the plant.[26]

8. *Special legislation relating to the use of water by the San Juan and Four Corners Plants from the Navajo Reservoir.*

It was noted, *supra,* at 29, that the Colorado River Storage Project Act authorized the Secretary to construct the Navajo Dam and Reservoir on the San Juan River in New Mexico. This was supplemented by

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[26] Act of Oct. 16, 1973, Pub. L. No. 93-97, 87 Stat. 318; Act of Oct. 25, 1972, Pub. L. No. 92-405, 86 Stat. 621; Act of Oct. 5, 1971, Pub. L. No. 92-134, 85 Stat. 365; Act of Oct. 7, 1970, Pub. L. No. 91-439, 84 Stat. 890; Act of July 6, 1970, Pub. L. No. 91-305, 83 Stat. 376; Act. of Dec. 11, 1969, Pub. L. No. 91-144, 83 Stat. 323.

the San Juan-Chama Project Act, 43 U.S.C. § 615ii et seq. Sec. 615ss(a) provides:

> "(a) No person shall have or be entitled to have the use for any purpose, including uses under the Navajo Indian irrigation project and the San Juan-Chama project authorized by sections 615jj and 615pp of this title, of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries originating above Navajo Reservoir to the use of which the United States is entitled under these projects except under contract satisfactory to the Secretary and conforming to the provisions of sections 615ii-615yy of this title.
>
> * * * * *
>
> "No long-term contract, except contracts for the benefit of the lands and for the purposes specified in sections 615jj and 615pp of this title, shall be entered into for the delivery of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries, as aforesaid, until the Secretary has determined by hydrologic investigations that sufficient water to fulfill said contract is reasonably likely to be available for use in the State of New Mexico during the term thereof under the allocations made in articles III and XIV of the Upper Colorado River Basin compact, and has submitted such determination to the Congress of the United States and the Congress has approved such contracts."

Sections 615uu(a), (b), and 615vv require the Secretary to comply with all the enumerated elements of the "Law of the River," require the inclusion of stipulations to that effect in all contracts, and give the consent of Congress to suits joining the United States as a party defendant in the event of noncompliance.

As to the San Juan Plant:

Pursuant to the foregoing authority, on April 11, 1968, the Secretary entered into a contract to store and deliver 20,200 acre-feet annually for use by the San Juan Plant, of which the estimated consumptive use was stated as 16,200 acre-feet per annum (Supplement at 123s). This contract was submitted to, and approved by, Congress in the Act of March 22, 1968,[27] which stated these quantities and described the proposed uses as "thermal electric generation."

As to the Four Corners Plant:

On October 10, 1958, the State Engineer of New Mexico granted the Utah Construction and Mining Company a permit (Supplement at 98s) to appropriate the use of the natural flow of the San Juan River to the extent of 51,000 acre-feet annually. Undivided rights in this permit to the extent of water requirements of the Four Corners Plant were assigned to the owners of that plant. The Act of March 22, 1968 (note 27, *supra*), approved a contract between the Secretary and Utah Construction Co. for the storage and delivery of 44,000 acre-feet annually from the Navajo Reservoir, for "Thermal electric generation," but water under that contract has not been made available to the Four Corners Plant.

It is clear that Section 4(e) of the Federal Power Act has no application to the Four Corners Plant, even assuming that that section encompasses steam plants. This is because this plant's uses of water are either (1) uses of natural flow, not stored water, hence, by

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[27] Pub.L. 90-272, 82 Stat. 52; 1 U.S. CODE CONG. & ADMIN. NEWS 63 (1968).

hypothesis, not "surplus water . . . from any Government dam," or (2) uses under a contract with the Secretary of the Interior, pursuant to that official's exclusive statutory authority to dispose of the use of water from the Navajo Reservoir, because, if water from Navajo Reservoir becomes available at all to the Four Corners Plant, it will be subject to the contract requirements of the San Juan-Chama Act, 43 U.S.C. § 615ss(a).

C. The decision below should be reversed and vacated as a moot advisory opinion, not applicable to the case before the Court.

In delegating plenary authority to the Secretary of the Interior to dispose of the consumptive use of water stored by federal dams in the Colorado River Basin, Congress has given no indication of an intent that the Federal Power Commission was being invited to stay on as a mother-in-law, cooking in the Secretary's kitchen. The Commission does not seek that nomination. When Congress referred to the Federal Power Commission in Colorado River legislation it did so in connection with hydroelectric projects only. *E.g.*, 43 U.S.C. § 1555. To hold that both the Commission and the Secretary should have power to fix the terms of a contract controlling the consumptive use of water stored by a government dam would, in the language of the Court in *Baker* v. *Carr,* 369 U.S. 186, 217 (1962), quoted with approval in *Gilligan* v. *Morgan,* 413 U.S. 1, 9 (1973), offer:

> ". . . the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

It was clearly unnecessary for the court below to construe the surplus water clause of Section 4(e) with respect to the Colorado River System. Its construe-

tion with respect to other river systems should await the day when such a case is before the court.

The court's decision should therefore be reversed and vacated as a moot advisory opinion.

Such is the established practice where a decision has been rendered moot by subsequent legislation, to avoid giving it the status of res judicata. *American Public Power Association, et al.* v. *Power Authority of the State of New York,* 355 U.S. 64 (1957), reversing and vacating as moot a judgment of the Court of Appeals for the District of Columbia Circuit, 247 F.2d 538 (1957); *Bryan* v. *Austin,* 354 U.S. 933 (1957); *United States* v. *Alaska S.S. Co.,* 253 U.S. 113, 116 (1920); *Board of Public Utility Commissioners* v. *Cia. General de Tabascos,* 249 U.S. 425 (1919). *Cf. McKay* v. *Clackamas County,* 349 U.S. 909 (1955); *Garcia* v. *Landon,* 348 U.S. 866 (1954); *United States* v. *Munsingwear, Inc.,* 340 U.S. 36 (1950); *United States* v. *Anchor Coal Co.,* 279 U.S. 812 (1929); *Brownlow* v. *Schwartz,* 261 U.S. 216, 218 (1923).

The same rationale requires that an opinion construing a statute which has been superseded by a later act, as in this case, should be vacated to avoid its res judicata status, even though the later statute itself antedated the court's construction of the predecessor act.

D. All of the complainants lack standing to litigate the issue of jurisdiction between the Secretary and the Commission.

1. *Injury in fact to the plaintiff is an element essential to the establishment of his standing to sue.*

The issue for decision in this case (if a decision were to be reached on the merits) is whether the Secretary of the Interior or the Federal Power Commission has

jurisdiction to grant the right, by contract or license, to the consumptive use of water stored by government dams in the Colorado River Basin. None of the complainants could be affected in the slightest by the decision of this issue one way or the other, hence none has standing to litigate it.

The Secretary and the Commission are equally subject to the environmental statutes, *e.g.*, the Clean Air Act, 42 U.S.C. § 1857, the 1972 amendments to the Federal Water Pollution Control Act, 33 U.S.C. § 1251, the National Environmental Policy Act, 42 U.S.C. § 4321. The environmental concerns expressed by the complainants here can be protected in suits under those acts [28] against the one official just as well as in suits against the other.[29]

The Chemehuevi and Cocopah Tribes, being the only complainants owning water rights in the Colorado River, offer these as a special basis for asserting potential injury. Actually, the Law of the River not only completely insulates them from any such possibility, but precludes an attack by them, *qua* water uses, on the use of water by any of the six power plants.

The decree in *Arizona* v. *California*, 376 U.S. 340 (1964), awarded, of the first 7,500,000 acre-feet of consumptive use of main stream water available for release from Hoover Dam, 2,800,000 acre-feet for use in Arizona, 4,400,000 acre-feet for use in California, and 300,000 acre-feet for use in Nevada (Art. II(B)(1)).

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[28] For example, all of the complainants except the two tribes were plaintiffs in the *Jicarilla* environmental case against the Secretary of the Interior.

[29] See the environmental provisions contained in the water use contracts on file with the Court.

The Chemehuevi uses are part of the decreed apportionment to California. Those of the Cocopah are part of the decreed apportionment to Arizona. Article II (D)(1), (2) of the decree awards "present perfected rights" (defined in Article I(G), (H)) to

> "(1) The Chemehuevi Indian Reservation in annual quantities not to exceed (i) 11,340 acre feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907;
>
> "(2) The Cocopah Indian Reservation in annual quantities not to exceed (i) 2,744 acre feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 431 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of September 27, 1917;"

These rights are of such high priority, and the quantities are so small in comparison with the quantities apportioned to the respective States, that in no conceivable circumstances could use of water by any water user in any State cause shortages to the Chemehuevi or Cocopah Tribes. Article II(B)(3) fully protects these present perfected rights in the event of shortage.

Beyond this, legislation implementing the decree makes it doubly certain that shortages, if any, shall be borne by others than holders of present perfected rights. Colorado River Basin Project Act, 43 U.S.C. § 1521(b).

By the same token, the use of water by the Mohave Plant, in Nevada, is shielded by Article II(B)(1) of the decree from attack by users in other States of the Lower Basin, including the Chemehuevis in California and the Cocopahs in Arizona. This is because the use by the Mohave Plant is within the 300,000 acre-feet apportioned to Nevada by that article, and is made pursuant to contracts of the Secretary (Supplement at 99s) executed pursuant to the requirement of such contracts stated in Article II(B)(5).

Both the Secretary and the Commission are included in the injunction imposed by Article II against releases otherwise than in accordance with the decree.

Nothing that either the Secretary of the Interior or the Federal Power Commission might do or refuse to do could diminish or enlarge the decreed rights to use of water held by the Chemehuevi or Cocopah Reservations, or, for that matter, the decreed water rights of Nevada, used in operation of the Mohave Plant, attacked by these complainants.

The Colorado River Compact is a positive bar to any complaint by these tribes against the use of water by any of the five plants in the Upper Basin.

That compact, in Article III(a), provides:

> "(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

Article III(d), (e) provides:

> "(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.
>
> "(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses."

Uses of water by the five plants in the Upper Basin are within the compact entitlement of the Upper Basin. The exercise of these apportioned rights cannot give rise to actionable injury to any water user in the Lower Basin. Such is the very purpose of the compact. This is in addition to the fact that, in view of the guarantee of water to the Lower Basin in Article III(d), no use by these plants could conceivably cause shortages to those tribes. The guaranteed supply, averaging 7,500,000 acre-feet annually, is over 500 times their total decreed diversion rights and thus over 1,000 times their decreed consumptive use requirements.

Consequently, as in the case of the Lower Basin Mohave Plant, a decision as between the licensing authority of the Secretary or that of the Commission, with respect to the five power plants in the Upper Basin, could not affect the water rights of the Chemehuevi and Cocopah Tribes. Lacking injury, they lack standing to demand that the water rights of the five Upper Basin plants be conditioned on issuance of Federal Power Commission licenses to use surplus water.

II.

THE RATIONALE OF THE COURT'S PROPER "PROJECT WORKS" HOLDING SHOULD HAVE CONTROLLED ITS DISPOSITION OF THE "SURPLUS WATER" ISSUE.

A. The text of the act plainly relates only to hydroelectric projects, to the exclusion of thermal plants, regardless of the source of the water that they use.

Steam-electric power generation cannot be made to fit the Procrustean bed of a statute wholly designed to regulate the development of water power, the Federal Water Power Act.

The act, in terms, (1) relates the Commission's licensing jurisdiction only to hydroelectric projects, not thermal projects, and (2) makes no exception of thermal plants using surplus water from government dams.

The lower court concedes the major premise (App. 73):

> "We agree with intervenors that it is unlikely that, if Congress had intended to include the regulation of thermal-electric generation as a basic purpose of the Act, it would have limited reference in the preface to hydroelectric power—the lesser utilized of the two sources of electric power generation. The explicit reference to only hydroelectric power is consistent with the legislative history of concern with promoting the 'comprehensive development of water power.'" (Footnotes omitted.)

The court goes on to say "[o]ther provisions of the Act bear this out," and catalogues Section 4(a), 16 U.S.C. Sec. 797(a), and Section 24, 16 U.S.C. Sec. 818, which, it says, "single out" water power and water-power development for study and planning.

The statute, in addition to these, contains a long list of paragraphs which are identified with the use of

water power, never with thermal power, and so of course never making a distinction between thermal plants using water from navigable streams and thermal plants using surplus water from government dams. All are outside the statute.

For example:

The definitions of "project," and "project works," in Section 3(11) and (12), are in terms which the court held excluded thermal power plants which use water of navigable streams, and included only hydroelectric projects (App. 75). Examination of the language of paragraph (11) shows it equally inapplicable to the identification of *all* thermal power plants. The references are all keyed to the works which carry water under pressure down to and through the turbines, propelled by this pressure, and the control equipment for these hydraulic works. Had it been intended to include steam plants using surplus water from a government dam in the scope of the Water Power Act, a definition of the elements of a thermal power plant (*e.g.*, boilers, steam turbines, condensers, fuel handling and ash disposal facilities, railroad yards, etc.) would have been as essential as a definition of the elements of a hydroelectric plant. "Project" and "project works" are terms of art, reappearing throughout the act. Insofar as hydraulic features of a thermal plant are concerned, they are the antithesis of those of a hydroelectric project. The steam plant's water system is keyed to pumps, not turbines, lifting water uphill, not directing it downhill, for consumption in conversion of energy supplied by fuels, not by falling water.

The text of the act is consistent in its focussing on water power. See, in addition to the sections cited by

the court, Section 4(f) in conjunction with Section 9 (preliminary permits), Section 4(g) (orders to conserve and utilize the navigation and water power resources of the region), Section 10(a) (comprehensive plans for improvement and utilization of water power development), Section 10(b) (any dam or project works), Section 10(c) (maintenance of project works in a condition of repair adequate for the purposes of navigation), Section 10(e) (payment for the development and utilization of power created by any government dam), Section 10(f) (payments for benefits to a project not under license, occasioned by an upstream dam), Section 12 (protection of interests of navigation), Section 13 (inclusion of locks), Section 14 (right of U.S. to take over a project, including locks), Section 18 (maintenance of navigation aids, fishways, etc.), Section 21 (power of eminent domain over property necessary for a dam, reservoir, diversion structure, and appurtenant works, if justified for improving or developing a waterway), and so on.

. would be remarkable to discover, latent in one subsection, an unspoken intent that the act encompass use of water in one kind of thermal plant (excluding all others), whereas all other sections of the act which refer to use of water for power purposes do so in terms which make sense only if they are related to hydroelectric development of a waterway.

The quantities of water diverted and used by a steam plant in boilers and cooling apparatus are miniscule compared to the quantities required by a hydroelectric project generating the same quantity of power, and Congress, concerned with the development of water

power, had no reason to concern itself with the insignificant quantities of water used by thermal plants.[30]

B. The opinion below conflicts with decisions made by Congress in 1935 in amending the Federal Water Power Act.

In 1935 the Water Power Act was amended by Title II of the Public Utility Act of 1935 and was made Title I of the Federal Power Act. The 1935 Act added Titles II and III to the Federal Power Act to regulate the interstate transmission and sale of electricity. In the course of considering amendments, Congress made several decisions relevant to the present case.

1. In 1935, two bills, H.R. 5423, and S. 1725, were introduced which proposed to require public utilities to obtain certificates of public convenience and necessity for the construction of transmission and production facilities. Section 204(a) of both bills stated as follows:

> "Sec. 204. (a) No public utility shall undertake the construction or extension of any facilities . . ., or engage in production or transmission by means of any such new or additional facilities . . . unless and until there shall first have been obtained from the Commision a certificate that the present or future public convenience and necessity require or will require such new construction . . . ."

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[30] For example, the Glen Canyon Dam power plant, with the reservoir at normal operating elevation, is capable of generating 1,092 megawatts of power by passing 28,000 cubic feet of water per second through the turbines. In comparison, the Navajo steam plant, using boiler and cooling water from the same reservoir, consumes only 47 cubic feet per second (34,100 acre-feet per year) in generating 2,310 megawatts of power by burning coal. Each megawatt produced by steam at Lake Powell thus requires availability of less than one tenth of one percent of the water required to produce each megawatt by the hydroelectric power plant there.

The scope of the certification provision, over steam plants and transmission lines used in interstate commerce, was explained during committee hearings:

> "The CHAIRMAN: Let me ask you a question right there: It has been stated to me that in event some power company desired to build a plant, a transformer, or something of that kind, within a State, particularly another plant in a State, that this would give the Federal Power Commission the right to say that they would not be allowed to do it. What about that?
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> "Mr. DEVANE: If it was a facility used in connection with the transmission of energy in interstate commerce, this bill does require such a company to come to the Commission for a certificate of convenience and necessity. If it is a facility that is used solely for the producton of energy used in intrastate commerce, they would not have to come. There is an effort to secure control of the construction or the abandonment of facilities used in interstate commerce." *Hearings on Public Utility Holding Company Act of 1935 Before the Senate Comm. on Interstate and Foreign Commerce,* 74th Cong., 1st Sess. 249-50 (1935); *see also* the testimony of Dozier DeVane, FPC Solicitor, *id.* at 257-59.

The Commission proposal was viewed with alarm. As one Senator said, "this business of telling people whether they shall operate a plant . . . . [t]hat is the dangerous thing, to my mind." *Id.* at 259.

The proposal to extend jurisdiction over "production facilities," including steam plants, was not accepted by Congress. S. REP. No. 621 (S.2796), 74th Cong., 1st Sess. 20 (1935).

The significance of this proposed amendment, and its rejection, is clear. If Congress rejected the notion that

steam plants should be subject to certification procedures in Title II of the new Federal Power Act, it did not intend to subject those same plants, as "project works" or users of "surplus water," to the licensing procedures of Title I of the Act, embodying the Federal Water Power Act.

2. Section 10(e), 16 U.S.C. § 803(e), which relates to charges payable by licensees, was amended in 1935 by adding a proviso referring to dams or structures in reclamation projects, requiring, in such case, the approval of the charges by the Secretary, and, in the case of such structures on tribal lands, the approval of the Indian tribe, subject to readjustment of charges at the end of 20 years and each 10 years thereafter. Use of surplus waters from reclamation dams by hydroelectric projects had always been subject to charges under the Federal Power Act. The new feature was requirement of approval by the Secretary. The receipts continued to go into the Treasury, for allocation under Section 17 of the Federal Power Act, 16 U.S.C. § 810, among various funds and beneficiaries. All this was changed, as to the Colorado River Basin, by Section 5 of the Colorado River Storage Project Act, 43 U.S.C. § 620(d), and Section 403 of the Colorado River Basin Project Act, 43 U.S.C. § 1543, which direct that revenues collected in connection with all Upper Basin dams and water contracts involved here should be allocated among funds and beneficiaries quite different from those named in the Federal Power Act. Revenues received by the Secretary from the Mohave Plant's use of water, in the Lower Basin, are controlled by Section 2 of the Boulder Canyon Project Adjustment Act, 43 U.S.C. § 618a, enacted in 1940.

3. Congress adopted an amendment to Section 10(f) in 1935 which negates the lower court's assumption that the existence of an upstream government dam imposes the requirement of a license on downstream power plants benefited thereby.

Section 10(f), 16 U.S.C. § 803(f), as amended in 1935, provides otherwise, even with respect to hydroelectric projects:

> "Whenever any power project *not under license* is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of *such unlicensed project*, shall determine and fix a reasonable and equitable *annual charge to be paid* to the licensee or permittee on account of such benefits, or *to the United States if it be the owner of such headwater improvement.*" (Emphasis added.)

The consequence that the statute imposes on the downstream power plant benefiting from a government upstream dam is *not* the necessity for acquisition of a "surplus water" license, but the necessity of paying for the benefits thus received by this "unlicensed project." There could not be such a thing as an unlicensed project "benefited by the construction work of . . . the United States," if the opinion below were correct.

So far as we have found, in only one case in 54 years has the Commission undertaken to invoke the surplus water clause of Section 4(e) with respect to such downstream plants, even for licensing of a hydroelectric project, and in that case this same court of appeals set the Commission's order aside. It did so independently of the 1935 amendment.

In *California Oregon Power Co.*, 13 F.P.C. 1, 4 (1954), 15 F.P.C. 14 (1956), the Commission asserted licensing jurisdiction over certain hydroelectric plants (two of which were 57 and 59 miles downstream from a government dam). In our case the court quotes with apparent approval from the 1954 FPC decision in that case (App. 99):

> "Where there is available stored water not to be used in irrigation, which represents storage over and above that needed for irrigation, and which would otherwise flow unused down the main channel of the stream, that water is 'surplus water,' and, if used for power development, would require a license from this Commission."

But this same court, in *California Oregon Power Co. v. FPC*, 239 F. 2d 426 (D.C. Cir. 1956), dismissed a petition for review of that FPC decision because of lack of a justiciable controversy (these being navigable waters, thus affording "admitted jurisdiction"). In doing so, it expressed its skepticism about the Commission's definition of "surplus waters," quoted above, which the same court now embraces:

> "... even counsel for the Commission is uncertain that this definition is correct.
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> * * * * *
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> "The record is, in fact, in such a state that we could hardly hold (if we reached the question) that Copco has been shown to be a user of surplus water, on any theory." *Id.* at 432.

Nevertheless, the court in the present case appears to have adopted, with respect to *steam* plants, the jurisdictional basis that it declined to adopt in the earlier case, with reference to *hydroelectric* plants, *i.e.*, use of water flowing in a stream below a government dam.

C. Prior construction of the Federal Power Act by this Court removes any doubt as to the act's inapplicability to the licensing of fossil-fuel steam plants.

Years ago, this Court recognized that the Act was "distinctly an effort to provide federal control over and give federal encouragement to water power development." *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 180 n. 23 (1946). In another decision, the Court stated:

> "the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties." *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 251 (1954).

Against this background of judicial recognition of the scope of the Federal Power Act, the Court decided the *Taum Sauk* case, *FPC* v. *Union Electric Company*, 381 U.S. 90 (1965). There, the Court held that a pumped storage project, as a hydroelectric facility not affecting a navigable stream but affecting interstate commerce, was subject to FPC jurisdiction. In disposing of the company's arguments seeking to avoid federal jurisdiction, the Court addressed the company's argument "that an anomalous consequence flows from the Commission's construction of the Act and its view that steam plants generating large amounts of energy for interstate transmission are not within the scope of § 23(b). . . ." 381 U.S. at 109. The argument was that since jurisdiction over a pumped storage project rested on the interstate transmission of energy, "there can be no basis for distinguishing between a steam plant and a hydroelectric facility both generating energy for interstate use." *Id.* at 109-10. The Court had little difficulty in disposing of this argument.

> "The answer to this conundrum is that unlike Part II [of the Act], under which the Commis-

> sion regulates various aspects of the sale and transmission of energy in interstate commerce, Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydro electric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission." *Id.* at 110 (footnote omitted).

The dissenting Justices agreed:

> "The legislative history here, however, establishes to my satisfaction that it has required licenses of neither steam plants nor the type of hydroelectric plant here involved. . . ." *Id.* at 115.

Certainly, steam plants using "surplus water" cannot be carved out as an exception to the Court's rationale.

D. The administrative construction of the act, reported to Congress for more than a half-century, has consistently related the Commission's licensing jurisdiction solely to hydroelectric power, with no exception for thermal plants using surplus water from government dams.

In 1921, in its first annual report, the FPC noted that "the Commission is limited to the consideration of projects designed to produce water power."[31] This has been the consistent Commission policy ever since. As recently as 1972, FPC Chairman Nassikas testified that:

> "Except for our hydroelectric licensing authority, we do not license any generating facility. While the Atomic Energy Commission licenses nuclear

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[31] FPC, First Annual Report 138, 155 (1921).

> steam generating plants, there is no Federal licensing currently of fossil fuel steam generating plants. . . .
>
> * * * * *
>
> "Part I licensing procedures do not apply to the licensing of fossil or thermal electric generating facilities." [32]

In the meantime, Congress had several times received similar expressions from the Commission,[33] other agencies of the executive branch, and interested parties [34] (including the Sierra Club), and, as the court below recognized, had amended the act on several occasions (App. 76). It is not only significant, as the court below recognized, that Congress expressed no dissatisfaction with this administrative construction; it is also significant that in none of these dialogues between the Commission and Congress did either of them suggest the notion that while thermal plants using the waters of a navigable stream were excluded from the Commission's licensing jurisdiction, these same thermal plants were nevertheless included in that jurisdiction, if a government dam were located upstream.

The court of appeals recognizes that the Commission's consistent administrative construction has been

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[32] *Hearings on Interim Nuclear Licensing Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 2d Sess. 249, 261 (1972).

[33] 1962 FPC ANNUAL REPORT, 12-13; 1966 FPC ANNUAL REPORT, 8-9; I FPC NATIONAL POWER SURVEY 100-01 (1964).

[34] *E.g.*, Interior Department, Office of Science and Technology, EPA, AEC. *Power Plant Siting and Environmental Protection, Hearings Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. (1971).

that "the Commission is limited to the consideration of projects designed to produce water power" (App. 74); that this consistent administrative interpretation is entitled to "great weight," *Udall v. Tallman,* 380 U.S. 1 (1965); *Power Reactor Development Co. v. International Union,* 367 U.S. 396 (1961), and that this is particularly true, having been an interpretation given in the initial implementation of the act, communicated to Congress; and that Congress, in repeated amendments of the act, "gave no hint of congressional desire to override the Commission's construction of the scope of its jurisdiction" (App. 76).

The Commission's administrative construction has never suggested the distinction made by the court below. There is no justification for reading into it an exception that is not there.

III.

THE LEGISLATIVE HISTORY OF THE FEDERAL WATER POWER ACT PROVES THAT CONGRESS AUTHORIZED THE FPC TO REGULATE ONLY HYDROELECTRIC UTILIZATION OF SURPLUS WATER FROM GOVERNMENT DAMS, AND THAT CONGRESS SPECIFICALLY REFUSED TO INCLUDE IN THE WATER POWER ACT PLENARY AUTHORITY OVER OTHER WATER USES.

A. Early legislation, bills leading to enactment of the Federal Water Power Act, and congressional debates all show that Congress was only concerned with use of surplus water in generating hydroelectric power.

For the Court's convenience, we have submitted a separately bound Supplement to our brief containing a detailed account of legislative history. The following is a summary.

The legislative history of the surplus water clause, and its common meaning and usage both prior to, and

subsequent to, enactment of the Federal Water Power Act reveal that the Act's jurisdiction extended solely to hydro power.[35] The congressional debates, discussions, committee reports, and proposed bills mention "surplus water" *only* in the context of hydroelectric generation. Reference to utilization of surplus water in Section 4(e) and Section 10(e) of the Act, or their earlier counterparts, was always in relation to water power, and nothing else. The idea of conferring on the Commission licensing jurisdiction over the utilization of surplus water for irrigation, domestic water supply, steam plants, or other consumptive uses was never advanced. When irrigation was mentioned, it was in the context of preserving states rights versus the federal government and avoiding impairment of irrigation opportunities. When steam power was mentioned (as it was) it was in the context of steam plants as unlicensed competition with licensed water power projects,[36] consuming coal which could be conserved and replaced by hydro power.

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[35] The history will show that often the terms "surplus water" and "water power" were intertwined. The discussions of both expressions seem to assume a benefit to the licensee derived from the change in the elevation of the water surface made by the dam, rather than a change in the regimen downstream. What is clear is that both expressions related only to hydroelectric generation. A distinction between leases of government-owned facilities and leases of surplus water appeared in 1928 in Section 6 of the Boulder Canyon Project Act, 43 U.S.C. § 617(e).

[36] *E.g.*, 51 CONG. REC. 12336, 12593, 12777 (1914); 53 CONG. REC. 2640, 10450 (1916); 56 CONG. REC. 8931, 9282 (1918); 59 CONG. REC. 1101, 1430, 1473 (1920); *Hearings on S. 1419 Before the House Committee on Water Power*, 65th Cong., 2d Sess. 166-83 (1918).

Statutes involving surplus water, 1888-1914

In early years, Congress passed three types of statutes[37] dealing with regulation of hydroelectric development. These, as noted in a speech made on the Senate floor in 1913 related to: (i) "dams constructed by acts of Congress where surplus water, not needed for navigation, has been leased for water power purposes"; (ii) "where dams, or dams and locks, are to be constructed in the future by the Government, the water power created incidentally thereto shall be leased under the direction of the Secretary of War"; and (iii) "acts of Congress granting permission to lessees to construct dams in navigable streams subject to various conditions." 49 CONG. REC. 2601-03 (1913) (remarks of Senator Burton). Under these acts, licenses were issued on a project by project basis.

The earliest legislation[38] involving lease of surplus water was an appropriations act for rivers and harbors in 1888. Act of August 11, 1888, ch. 860, 25 Stat. 400. The following provision was made:

> "[T]he Secretary of War is hereby authorized and empowered to grant leases or licenses for the use of the *water powers* on the Muskingum River at such rate and on such conditions and for such periods of time as may seem to him just, equitable,

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[37] See S. Doc. No. 57, 62d Cong., 1st Sess. (1911), for a listing of early statutes involving government dams.

[38] Perhaps the earliest mention of "surplus water" is in a deed of property on the Fox River in Wisconsin to the United States by the Green Bay and Mississippi Canal Co. between 1870 and 1872. The deed is cited but not quoted in Kaukauna Water Power Co. v. The Green Bay & Mississippi Canal Co., 142 U.S. 254, 259 (1891).

> and expedient: *Provided,* That the leases or licenses shall be limited to the use of the *surplus water* not required for navigation." *Id.* at 417 (emphasis added).

From 1890 through 1909, Congress enacted seven more statutes,[39] containing similar language, for the lease of surplus water for power development. These statutes, comprising the basis of the comprehensive water power bill discussions commencing in 1914, culminating in the 1920 Act, have a common thread. The historical usage of the term "surplus water" applied only to the development of water power.[40] This principle continued, and was not altered in the many proposed bills, amendments, and discussions leading to the enactment of the comprehensive water power act. Congress considered new legislation "in view of the provisions of the legislation already enacted," and effect should be given to them. *St. Louis, Iron Mountain & Southern Ry. Co. v. United States,* 251 U.S. 198, 207 (1920).

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[39] These statutes were:

Act of Sept. 19, 1890, ch. 907, 26 Stat. 426, 447 (Green and Barren Rivers); Act of June 13, 1902, ch. 1079, 32 Stat. 331, 358, *as amended,* Act of June 28, 1902, ch, 1299, 32 Stat. 408, 409 (Cumberland River); Act of March 6, 1906, ch. 517, 34 Stat. 52 (Muscle Shoals); Act of April 23, 1906, ch. 1660, 34 Stat. 130 (Bear River); Act of May 9, 1906, ch. 2438, 34 Stat. 183, 184 (Coosa River); Act of June 25, 1906, ch. 3530, 34 Stat. 456, 457 (Study Commission); Act of March 4, 1907, ch. 2912, 34 Stat. 1288 (Coosa River, Lock Twelve); Act of March 3, 1909, ch. 264, 35 Stat. 815, 819 (Wabash River).

[40] That is, to power created by use of the kinetic energy of falling water.

Legislative proposals, 1914-1915 (63d Congress)

In 1914, Congress considered for the first time legislation to regulate water power in a comprehensive manner, as opposed to the earlier piecemeal regulation of individual projects and private licenses. Two bills, the Adamson bill, H.R. 16053, dealing with control of power on navigable streams, and the Ferris bill,[41] H.R. 16673, dealing with water power development on public lands, were introduced.

Section 14 of the Adamson bill contained a provision dealing with surplus water, which, as introduced and reported to the House floor read:

> "That the Secretary of War, upon the advice and with the approval of the Chief of Engineers, may lease to any applicant having complied with the laws of the State in which the dam is constructed or to be constructed by the United States, *the right to develop power from the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant,* and owned by the United States, and on such terms as may be deemed by the Secretary of War, and Chief of Engineers for the best interests of the United States, and in awarding such lease preference shall be given to the applicant whose plans are deemed by any action of Congress or by the Secretary of War and Chief of Engineers to be best adapted to conserve and utilize in the public interest the *navigation and water power resources of the region,* and all such leases and the parties

[41] As with all public lands bills, the Ferris bill contained no mention of surplus water. H.R. Rep. No. 842, 63d Cong., 2d Sess. (1914).

thereto and the terms and conditions thereof shall be reported annually to Congress." 51 CONG. REC. 11415 (1914) (emphasis added).

The report of the House Committee on Interstate and Foreign Commerce explained that:

> "Section 14 is a new section authorizing the Secretary of War, with the approval of the Chief of Engineers, to lease to any applicant who has complied with the laws of the State in which the dam may be located any surplus power developed by a dam that is constructed or owned by the United States for the purposes of navigation." *Id.* at 11070.

Remarks of congressmen during discussion of Section 14 support the view that only water power uses of surplus water were to be regulated. Congressman Mann stated:

> "We have many navigation dams in the United States. At many of them *there is surplus water which may be used for the development of water power*, and we authorize the Secretary of War to *lease that surplus water power* and to make charges for it." *Id.* at 11403 (emphasis added); see *id.* at 12330 (remarks of Mr. Lenroot).

And Congressman Brown, in extended remarks concerning Section 14, stated:

> "Section 14 is entirely in keeping with the rest of the bill. It permits the Secretary of War and the Chief of Engineers to lease the right to develop power from the surplus water flowing over any dam, present or future, for any length of time, with or without consideration." *Id.* at 768 (Appendix).

Congressman Stevens of New Hampshire offered an amendment to H.R. 16053. The surplus water

clause in this amendment [42] closely resembles the language adopted in the Federal Water Power Act. *Id.* at 13256-60. The debate surrounding the Stevens amendment shows that the House did not propose to reach non-hydro-power uses with the "use of surplus water" language. The author explained the effect of his proposed amendment on Section 14:

> "[T]he only substantial change made in section 14 by the amendment which I have offered is that no lease of water-power rights to anyone shall be for a longer period than 50 years.
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> ". . . no *lease of water-power* rights which belong to the Government should be given in perpetuity to any corporation, private or public." *Id.* at 13257 (emphasis added).

Congressman Adamson, the sponsor of H.R. 16053, reacted to the Stevens amendment:

> "[I]f the committee [referring to the House] thinks that it is more likely to serve the purpose intended, it is all right with me. I can not see any difference." *Id.* at 13256.

The Stevens substitute to Section 14 was agreed to by the House on August 4, 1914, *id.* at 13260, the date the Adamson bill was approved. *Id.* at 13276. The bill was sent to the Senate, whereupon it was referred to the Committee on Commerce on August 5, 1914, *id.* at 13296, which reported a substitute bill, S. 6413, on which no action was taken. S. REP. No. 846, 63d Cong., 3d Sess. (1914).

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[42] "That the Secretary of War be, and he is hereby, authorized to enter into leases for the use of surplus water and water power generated at dams and works constructed wholly or in part by the United States. . . ."

Legislative proposals, 1916 (64th Congress)

The scope of the surplus water clause was not altered in the congressional activities in 1916. Congress primarily considered two bills in 1916, the Ferris bill [43] in the House, and the Shields bill, [44] S. 3331 in the Senate. The Shields bill contained the following language concerning utilization of government dams:

> "Sec. 10. The Secretary of War may lease . . . *the right to utilize the surplus water power over and above that required for navigation at any navigation dam now or hereafter constructed,* either with or without contribution by the applicant, and owned by the United States . . . ." 53 CONG. REC. 2198 (1916) (emphasis added).

Although the term "surplus water" is not expressly included in S. 3331, it is apparent from the debates that Section 10 [45] was intended to incorporate surplus water in the term "surplus water power." Senator Shields explained the provision of his bill in the following manner:

> "Under Section 10 . . . provision is made for payment of the excess of water arising from dams built solely by the Government. . . ." *Id.* at 3064.

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[43] H.R. 408 dealt with public lands, and contained no reference to surplus water.

[44] In the 65th Congress, S. 1419 was also known as the Shields bill.

[45] The Senate committee report contains the following summary of Section 10, which indicates that the term "surplus water power" includes the concept of leasing surplus water, and that the section is limited to taking advantage of water power at government dams and does not extend to any other use of federal projects:

> "The bill also provides for the lease of water power in excess of that needed for operation and navigation facilities, incidentally produced by dams heretofore or which may be hereafter constructed by the United States in the improvement of navigable rivers. . . ." S. REP. No. 89, 64th Cong., 1st Sess. 4 (1916).

S. 3331 passed the Senate with Section 10 virtually unchanged. However, the House Committee on Interstate and Foreign Commerce struck out the entire bill and substituted a new bill. Section 19,[46] relating to the use of government dams stated:

> "Sec. 19. That the Secretary of War be, and he is hereby, authorized to enter into leases for the use of surplus water and water power generated at dams and works constructed wholly or in part by the United States in the interests of navigation. . . ." H.R. REP. No. 404, 64th Cong., 1st Sess. 6 (1916).

The House report explained that Section 19 was limited to the leasing of power created at federal dams, as had been the case for many years:

> "Section 19 regulates the method to be pursued by the War Department in *leasing the power* at dams erected in whole or in part by the Government itself. It contains substantially the same provisions passed by the House two years ago *and continues the method existing as to Government dams for many years, under which the War Department has satisfactorily regulated and leased surplus water at a number of such structures.*" *Id.* at 11 (emphasis added).

The language indicates that the purpose of the "surplus water" clause was to systematize a procedure which had been carried on in a piecemeal manner for many years. Plainly, the House intended the clause only to apply to such uses of surplus water as had been licensed in the past, *i.e.*, water power projects at federal dams.

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[46] The section is identical to Section 14 of H.R. 16053 as passed by the House in 1914.

At the close of this session, Congress had before it two bills concerning the use of government dams. The Shields bill, S. 3331 (Section 10), referred to "surplus water power" while the House substitute bill (Section 19) referred to "surplus water and water power." To Congress, both clauses meant the same thing. For example, Congressman Kent, in analyzing the Senate bill and the House substitute, interpreted the Senate bill, which contained the language "surplus water power" but not "surplus water," as follows:

> "The Secretary of War may lease, on such terms as he may provide, the right to develop power from surplus water at dams owned by the United States and where the cost of construction is borne by the United States or jointly with lessee." 53 CONG. REC. 1559 (Appendix) (1916).

In discussing the House substitute (which used the term "surplus water"), Kent stated the appropriate section:

> "[p]rovides that Secretary of War is authorized to lease surplus water and water power generated at Government dams for not to exceed 50 years upon terms provided by the Secretary, with periodical readjustment of rentals."[47] *Id.*

Obviously to Congressman Kent, and surely to other members of Congress, the two bills applied to the same subject—utilization of the hydroelectric potential of government dams. The principle remained unchanged in Congress next session.

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[47] Mr. Kent submitted a comparative analysis, section by section, in the Congressional Record. 53 CONG. REC. 1558-60 (Appendix) (1916).

Legislative proposals, 1918 (65th Congress)

In 1918, the Senate passed S. 1419 (the Shields bill), which contained a provision on surplus water identical to the wording of Section 10 of S. 3331 of the previous Congress, indicating the Senate's intent concerning the use of federal dams had not changed. The Senate report summary of Section 10, S. REP. No. 179, 65th Cong., 2d Sess. 4 (1917), is identical with the report in the previous session.

The House Committee on Water Power considered a substitute bill, a Wilson administration proposal, which for the first time included public lands and navigable waters in the same bill. In Section 4(d) of the substitute as introduced in committee, which is now Section 4(e), the Federal Power Commission was authorized:

> "To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation, State or municipality, for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power across, along, or in any of the navigable waters of the United States or upon any part of the public lands and reservations of the United States (including the Territories), *or for the purpose of utilizing the surplus water or water power over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant, and owned by the United States,* which licenses shall be irrevocable, except as herein pro-

vided . . . ." H. REP. No. 715, 65th Cong., 2d Sess. 23 (1918) (emphasis added).[48]

The bill as reported by the Committee on Water Power to the House floor contained one amendment relating to the "surplus water" clause. The clause was amended to read:

> ". . . or for the purpose of utilizing the surplus water or water power *from any navigation dam* . . . ." *Id.* at 3 (emphasis added).

The word "at" was changed to "from"[49] and the phrases "over and above that required for navigation" and "now or hereafter constructed either with or without contribution by the applicant, and owned by the United States" were struck from the clause. This deletion, however, does not indicate that the definition of surplus water had been changed.

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[48] Three features about this section are worth noting. First, the authority to lease surplus water is combined with the authority to license project works. Heretofore, regulation was pursuant to separate sections.

Second, the conjunction "or" is used between the terms "surplus water" and "water power" instead of "and" as in previous bills. It is not clear why this change was made, but there is no historical authority for concluding that the alteration of language indicates an intent of Congress to expand the Commission's licensing jurisdiction over surplus water.

Third, the language of the "surplus water" clause indicates that the definition had not been changed since the early bills. Surplus water is still computed by deducting that amount of water needed for navigation from the total quantity of water flowing at the dam.

[49] Changing the term "at any navigation dam" to read "from any navigation dam" did not alter the meaning of surplus water. The term "from" was equated as identical in meaning with surplus water "generated from" or "created from" a government dam. *Hearings on S. 1419 Before the House Committee on Water Power*, 65th Cong., 2d Sess. 395-96 (1918).

An amendment to Section 10(e) reveals that charges for the use of a navigation (government) dam were to be for the "utilization of power" created by the dam. Thus:

> "but in no case shall a license be issued free of charge for the development and utilization of power created by any navigation dam and that the amount charged therefor in any license shall be as nearly as possible that ascertained by the commission to be the value of such power." *Id.* at 7.

Clearly, the charge was to be only for the "value of such power," and not the value of water for consumption by irrigation, domestic, or steam plant uses.

The Committee on Water Power held extensive hearings on the substitute bill in 1918, and the 900 pages or so of testimony show that Congress was only concerned with development of the Nation's water power resources.[59] In response to questioning concerning non-power uses of water, Mr. Merrill, principal draftsman of the substitute bill, said:

> "Mr. MERRILL. . . . This bill is concerned only, in such instances, in the development of power. When that is done the licensee may make any other use that is available.
>
> "Mr. RAKER. But the bill simply gives him a license for power purposes?
>
> "Mr. MERRILL. Yes."
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> *Hearings on S. 1419 Before the House Committee on Water Power*, 65th Cong., 2d Sess. 89 (1918).

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[59] One argument for developing water power, repeatedly made, was that it would conserve coal, oil, and gas used by steam plants. *E.g.*, 56 CONG. REC. 276, 283, 9112, 9313 (1918). Manifestly, the bill did not have as its purpose development of projects to supply water for expansion of the use of these fuels in steam plants, but to foster the use of substitute water power.

Congressman Raker was concerned about the fact that the bill lacked any provision for the development of irrigation:

> "Mr. RAKER. Are you so sure that there ought not to be a provision in here so that arrangements could be made to handle that?
>
> "Mr. MERRILL. I do not think it is necessary at all. I do not see how there can be any question about it whatever. *The only thing this bill is doing is to grant a license for that particular power development occupying the public lands.* There is no assumption of any control whatever over any other uses the licensee may make of that water outside of that development." *Id.* at 89-90 (emphasis added).

An exchange between Congressman Taylor and Mr. Townley, assistant to the president of the Westinghouse Electric and Manufacturing Company, expressly indicates that steam plants were to be excluded from the bill:

> "Mr. TAYLOR. You have spoken about the handicaps that are against water power development as compared with steam. The steam plants are not subjected—or will not be subjected, generally speaking—to the governmental regulations that this bill provides for will they?
>
> "Mr. TOWNLEY. No, sir.
>
> "Mr. TAYLOR. And they will not be subjected either to the payment of Federal royalties?
>
> "Mr. TOWNLEY. No, sir."
>
> *Hearings on S. 1419 Before the House Committee on Water Power,* 65th Cong., 2d Sess. 179 (1918).

The substitute bill was passed by the House, and referred to a conference committee. The conference

report proposed no changes from the House substitute in the wording of Section 4(d), except for the substitution of the word "Government" for "navigation," with respect to federal dams.[51] The report was not acted upon.

Legislative proposals, 1919-20 (66th Congress)

A bill (H.R. 3184) which substantially corresponded to the House substitute bill considered in the previous session, as amended in conference, was introduced in the House of Representatives. No hearings were held on H.R. 3184, since Congress merely continued the unfinished business of the 65th Congress. H.R. Rep. No. 61, 66th Cong., 1st Sess. (1919).

Congressional debate on the 1920 Act in this session of Congress, although extensive, provides little illumination on the surplus water clause.[52] Reference in the debates to the surplus water clause continued to be confined to hydroelectric power generation. *E.g.*, 58 Cong. Rec. 2036 (1919) (remarks of Congressman Small re a moratorium on construction of power facilities by private parties at government dams; 59 Cong. Rec. 1041 (1920) (remarks of Senator Nelson re charges for use of a dam). Since the surplus water clause in the final act is virtually identical to the language of earlier legislative proposals, the intended

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[51] H.R. Rep. No. 1147, 65th Cong., 3d Sess. (1919); 57 Cong. Rec. 4630-35 (1919).

[52] The only significant amendment concerning surplus water was proposed by the Senate Commerce Committee, which recommended that the clause "from which flows surplus water not needed for Government purposes that may be disposed of under the provisions of this act" be deleted from the definition of "Government dam" in Section 3. The Senate agreed to the amendment without debate. 59 Cong. Rec. 1105 (1920).

scope of the clause as reaching only hydroelectric power had been settled.

The usage of the term "surplus water" has been clear, without exception, from 1888 until 1973. The term was always used solely in the context of hydroelectric power generation in the early acts of Congress, in the bills leading to the 1920 act, and in the congressional debates. Never once was licensing of any other use of surplus water ever proposed. Certainly if Congress had intended the FPC to regulate consumptive uses, *i.e.*, irrigation, domestic, or fossil-fuel steam plants, words to that effect would appear in the early acts, proposed bills, and congressional debates, hearings, or reports. There are none. To conclude that Congress intended to regulate consumptive use of surplus water by steam plants amounts to unfounded speculation, and, in this case, judicial legislation.

B. Contrary to the court of appeals' assumption, the Federal Power Commission did not inherit the broad "spectrum" of responsibilities for water use planning that had been previously assigned to the Waterways Commission. Those responsibilities, in any event, did not include issuing licenses for water power, steam power, or any other water uses.

The court of appeals bolstered its holding on the surplus water clause by asserting that the Federal Power Commission was intended by Congress to assume the duties and authority of the Waterways Commission, which was abolished by Section 29 of the Federal Water Power Act. The court stated:

> "The Act of 1917 [an Act establishing the Waterways Commission] was explicitly repealed by the Act of 1920, and the newly created Federal Power Commission took over the planning and coordination responsibilities of the Waterways Com-

> mission, which included consideraton of a spectrum of water uses not related to water power." (Footnotes omitted.) [53] App. 107.

The court of appeals, citing absolutely no authority for this proposition, used its assertion that Congress transferred to the FPC jurisdiction over "a spectrum of water uses" as a premise for the conclusion that:

> "[T]he 'surplus water' provision was intended to serve broader interests than the 'constructing, operating, and maintaining' clause, which was intended only to regulate nonfederal hydroelectric projects. It reflects an explicit concern with utilizing water resources to defray the cost of waterway improvements [54] as well as a concern with comprehensive water resource management. It empowers the FPC to license the use of either 'surplus water' or 'water power' from *any* Government dam, and thus is not limited to the mere leasing of excess Government water power." App. 109.

The legislative history of both acts contradicts the court of appeals assumption. The history shows (i) that the Waterways Commission's duties were restricted to conducting investigations and issuing reports; (ii) that the Commission lacked authority to issue licenses or permits for water power generation, much less steam power generation; and (iii) that the Waterways Commission's responsibilities were not

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[53] Contrary to the court's statement, the Federal Water Power Act did not repeal the 1917 Act, but only section 18 which created the Waterways Commission.

[54] (Our footnote.) As noted earlier, the Colorado River legislation earmarks the Secretary's receipts from disposition of water and power for special funds in the Colorado River Basin, not the national funds named in Section 17 of the Federal Power Act.

transferred to the Federal Power Commission. The history, chronologically, is as follows:

The Waterways Commission was established by Section 18 of the Rivers and Harbors Act of 1917, ch. 49, 40 Stat. 250. The Commission's scope over water matters was broad, but its duties were advisory, its functions being limited to coordinating efforts of government agencies, conducting investigations, and issuing reports and recommendations. Members were never appointed, so the Commission never functioned. The Commission's intended duties were as follows:

> "[T]o bring into coordination and cooperation the engineering, scientific, and constructive services, bureaus, boards, and commissions of the several governmental departments of the United States and commissions created by Congress that relate to study, development, or control of waterways and water resources and subjects related thereto, or to the development and regulation of interstate and foreign commerce, with a view to uniting such services in investigating, with respect to all watersheds in the United States, questions relating to the development, improvement, regulation, and control of navigation as a part of interstate and foreign commerce, including therein the related questions of irrigation, drainage, forestry, arid and swamp land reclamation, clarification of streams, regulation of flow, control of floods, utilization of water power, prevention of soil erosion and waste, storage, and conservation of water for agricultural, industrial, municipal, and domestic uses, cooperation of railways and waterways, and promotion of terminal and transfer facilities, to secure the necessary data, and to formulate and report to Congress, as early as practicable, a comprehensive plan or plans for the development of waterways and the water resources of the United States for the purposes of navigation and for every useful purpose,

> and recommendations for the modification or discontinuance of any project herein or heretofore adopted." 40 Stat. 250, 269.

Clearly, this act did not confer authority on the Waterways Commission to issue licenses or permits for water uses, and in particular for consumptive uses by steam plants. This statutory reading is confirmed by the views of members of Congress.

In discussing a proposed amendment by Mr. Humphreys to place the Waterways Commission in charge of the pending water power act, the following exchange in 1918 reveals the limited authority of the Waterways Commission:

> "MR. RAKER. The power given the commission in the river and harbor act relates soley to investigation and report, does it not?
>
> "Mr. HUMPHREYS. Yes.
>
> "Mr. RAKER. While this bill [House substitute to S. 1419] authorizes the granting of permits and licenses.
>
> "Mr. HUMPHREYS. Yes." 56 CONG. REC. 9658 (1918).

This understanding of the Waterways Commission's authority was confirmed in further discussions in the House:

> "Mr. FERRIS. Does the gentleman contend that the Waterways Commission, created by the Newlands amendment, has any power to issue franchises for water power?
>
> "Mr. HUMPHREYS. Not a bit." *Id.* at 9661-62.

The amendment offered by Congressman Humphreys was then rejected.[55] *Id.* at 9663.

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[55] Mr. Humphreys tried again in 1919 to place the Waterways Commission in charge of the Federal Water Power Act. That effort failed. 58 CONG. REC. 2026-27 (1919).

In July, 1919, Congressman Anderson proposed an amendment to repeal the legislation authorizing appointment of the Waterways Commission. 58 CONG. REC. 2250 (1919). It read:

> "That section 18 of an act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, approved August 8, 1917, is hereby repealed." *Id.*

The debate on the House floor reveals that the Waterways Commission's authority was repealed, *inter alia*, because it was not a functioning agency, not, as the court of appeals assumed, to give the FPC jurisdiction over all areas of interest to the defunct Commission. *E.g.*, 58 CONG. REC. 2250-51 (1919). The repealing amendment was passed. *Id.* A second vote on the amendment was taken later on the same day, and again it was passed, without debate. *Id.* at 2262. The amendment was retained in identical form in Section 29 of the Federal Water Power Act as enacted.

The Senate, in 1920, aware that the House had voted to repeal the Waterways Commission, aware that the Commission's duties were primarily to investigate and report, and aware that the Commission was not functioning, discussed the possibility of transferring all of the Waterways Commission's powers to the Federal Power Commission. 59 CONG. REC. 1172-76 (1920). Senator Ashurst stated that he would "propose at the appropriate time an amendment" which would read:

> "And all authority and power conferred and duties imposed . . . upon the Federal water-power commission, which, in the discharge of the same, shall be subject to all the requirements of said section 18 governing the commission referred therein." *Id.* at 1173.

Senator Ashurst's proposal was never introduced as an amendment, and never discussed again.

As we have shown, the defunct Waterways Commission's duties were confined to making investigations and reports; it had no authority to license uses of water for hydroelectric generation, and certainly not for steam power generation. Furthermore, contrary to the court of appeals assumption, the repeal of the Waterways Commission was not intended to transfer all of that Commission's functions to the FPC. Indeed, the opposite is true.

Clearly, the court of appeals bridge, which it constructed to link the Waterways Commission's duties to the court's holding on surplus water, and to transport thereon a cargo of jurisdiction as a legacy from the expiring Commission to the new one, collapses under the weight of the legislative history.

CONCLUSION

We submit that:

1. It would be appropriate for this Court to reverse and vacate the judgment below as moot, without reaching the issue of interpretation of Section 4(e) of the Federal Power Act. There are two reasons for this:

A. Legislation subsequent to the Federal Water Power Act of 1920 superseded Section 4(e) of that act with respect to the consumptive use of water from government dams in the Colorado River Basin (if, indeed, Section 4(e) ever gave the Commission such jurisdiction), and vested all federal authority with respect to such consumptive use in the Secretary of the Interior, who has exercised it in executing comprehensive contracts for the storage and delivery of water for use in

the plants involved here which use water from government dams.

B. All of the complainants lack standing to litigate the issue of whether the Secretary or the Commission is empowered to control the consumptive use of water stored by government dams in the Colorado River Basin.

2. If, however, the Court decides to consider, on the merits, the conclusions reached by the court of appeals with respect to the interpretation of Section 4(e), it should affirm that portion of the opinion which holds that the Commission does not have jurisdiction to license steam-electric generating plants as "project works" in consequence of their use of the waters of navigable streams, but should reverse the holding that Section 4(e) authorizes the licensing of the use by steam plants of surplus water from government dams.

3. In any event, remand to the Commission, ordered by the court of appeals, is not warranted. All of the questions involved are questions of law for resolution by the Court.

Respectfully submitted,

NORTHCUTT ELY
FREDERICK H. RITTS
Law Offices of Northcutt Ely
Watergate 600 Building
Washington, D. C. 20037
and
HARRY A. POTH, JR.
PEYTON G. BOWMAN, 3RD
Reid & Priest
40 Wall Street, New York
N.Y. 10005

1701 K Street, N. W.
Washington, D. C. 20006
Attorneys for all Petitioners

NICHOLAS H. POWELL
Snell & Wilmer
400 Security Building
Phoenix, Arizona 85004
Attorneys for Arizona Public Service Company

WILLIAM DUNCAN
Kemp, Smith, White, Duncan & Hammond
P. O. Box 2800
El Paso, Texas 79999
Attorneys for El Paso Electric Company

BURT S. PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power

RALPH GUY JESSON
Assistant City Attorney
111 North Hope Street
Los Angeles, California 90051
Attorneys for Department of Water and Power, City of Los Angeles

M. GENE MATTEUCCI
P. O. Box 230
Las Vegas, Nevada 89101
Attorney for Nevada Power Company

REX E. LEE
2840 Iroquois Drive
Provo, Utah 84601
Jennings, Strouss & Salmon
111 W. Monroe Street
Phoenix, Arizona 85003
Attorneys for Salt River Project Agricultural Improvement and Power District

SHERMAN CHICKERING
C. HAYDEN AMES
EDWARD P. NELSEN
ALLAN J. THOMPSON
Chickering & Gregory
111 Sutter Street
San Francisco, California 94104
Attorneys for San Diego Gas & Electric Company

JOHN R. BURY
Assistant General Counsel
P.O. Box 800
Rosemead, California 91770
Attorney for Southern California Edison Company

L. V. ROBERTSON, JR.
General Attorney
Tucson Gas and Electric Company
220 West Sixth Street
Tucson, Arizona 85703

DONALD E. DICKERMAN
Holesapple, Conner, Jones, McFall & Johnson
P.O. Box 310
Tucson, Arizona 85702
Attorneys for Tucson Gas & Electric Company

SIDNEY G. BAUCOM
ROBERT GORDON
P.O. Box 899
Salt Lake City, Utah 84110
Attorneys for Utah Power & Light Company

ATTACHMENT A

STATUTORY PROVISIONS

Federal Power Act

Section 4(e) of the Federal Power Act, 16 U.S.C. Section 797(e) provides:

"[Sec. 797] The Commission is authorized and empowered—

* * * * *

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the pur-

pose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided further,* That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection."

Section 10(e) of the Federal Power Act, 16 U.S.C. Section 803(e), provides:

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of sections 792, 793, 795-818, and 820-823 of this title; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided,* That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands

as provided in section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further,* That licenses for the development, transmission or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

Section 23(b) of the Federal Power Act, 16 U.S.C. Section 817, provides:

"It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior

to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part therof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws. June 10, 1920, c. 285, § 23, 41 Stat. 1075; Aug. 26, 1935, c. 687, Title II, § 210, 49 Stat. 846."

Boulder Canyon Project Act

Section 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d, provides in part:

"Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States

on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

Section 6 of the Boulder Canyon Project Act, 43 U.S.C. § 617e, provides:

> The dam and reservoir provided for by section 617 of this title shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: *Provided, however,* That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 617d of this title relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.
>
> The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Power Act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture

and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this subchapter or penalizing failure to comply with such regulations or with the provisions of this subchapter. He shall also conform with other provisions of the Federal Power Act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until this subchapter shall become effective as provided in section 617c of this title.

Section 8 of the Boulder Canyon Project Act, 43 U.S.C. Section 617g, provides:

(a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this subchapter to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact,

if any, between the States of Arizona, California, and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may have been negotiated and approved by said States and to which Congress shall have given its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided*, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 617d of this title prior to the date of such approval and consent by Congress.

Reclamation Project Act of 1939

Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), provides:

"(c) The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as

in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: *Provided further*, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes."

Colorado River Storage Project Act

Section 4 and 14 of the Colorado River Storage Project Act, 43 U.S.C. §§ 620c, 620m, provide:

"Sec. 4. Except as otherwise provided in this Act, in constructing, operating, and maintaining the units of the Colorado River storage project and the participating projects listed in section 1 of this Act, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto): *Provided*, That (a) irrigation repayment contracts shall be entered into which, except as otherwise provided for the Paonia and Eden projects, provide for repayment of the obligation assumed thereunder with respect to any project contract unit over a period of not more than fifty years exclusive of any development period authorized by law; (b) prior to construction of irrigation distribution facilities, repayment contracts

shall be made with an 'organization' as defined in paragraph 2(g) of the Reclamation Project Act of 1939 (53 Stat. 1187) which has the capacity to levy assessments upon all taxable real property located within its boundaries to assist in making repayments, except where a substantial proportion of the lands to be served are owned by the United States; (c) contracts relating to municipal water supply may be made without regard to the limitations of the last sentence of section 9(c) of the Reclamation Project Act of 1939; and (d), as to Indian lands within, under or served by any participating project, payment of construction costs within the capability of the land to repay shall be subject to the Act of July 1, 1932 (47 Stat. 564): *Provided further*, That for a period of ten years from the date of enactment of this Act, no water from any participating project authorized by this Act shall be delivered to any water user for the production on newly irrigated lands of any basic agricultural commodity, as defined in the Agricultural Act of 1949, or any amendment thereof, if the total supply of such commodity for the marketing year in which the bulk of the crop would normally be marketed is in excess of the normal supply as defined in section 301(b) (10) of the Agricultural Adjustment Act of 1938, as amended, unless the Secretary of Agriculture calls for an increase in production of such commodity in the interest of national security. All units and participating projects shall be subject to the apportionments of the use of water between the Upper and Lower Basins of the Colorado River and among the States of the Upper Basin fixed in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, and to the terms of the treaty with the United Mexican States (Treaty Series 994).

* * * * *

"Sec. 14. In the operation and maintenance of all facilities, authorized by Federal law and under the jurisdiction and supervision of the Secretary of the Interior, in the basin of the Colorado River, the Secretary of the Interior is directed to comply with the applicable provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, the Boulder Canyon Project Act, the Boulder Canyon Project Ad-

justment Act, and the Treaty with the United Mexican States, in the storage and release of water from reservoirs in the Colorado River Basin. In the event of the failure of the Secretary of the Interior to so comply, any State of the Colorado River Basin may maintain an action in the Supreme Court of the United States to enforce the provisions of this section, and consent is given to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise."

Navajo-San Juan Chama Project Act

Sections 11(a), (b), 13(a), (b), 14 of the Navajo-San Juan Chama Project Act, 43 U.S.C. §§ 615ss(a), (b), 615uu (a), (b), 615vv provide:

Sec. 615ss(a), (b):

"(a) No person shall have or be entitled to have the use for any purpose, including uses under the Navajo Indian irrigation project and the San Juan-Chama project authorized by sections 615jj and 615pp of this title, of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries originating above Navajo Reservoir to the use of which the United States is entitled under these projects except under contract satisfactory to the Secretary and conforming to the provisions of sections 615ii-615yy of this title. Such contracts, which, in the case of water for Indian uses, shall be executed with the Navajo Tribe, shall make provision, in any year in which the Secretary anticipates a shortage, taking into account both prospective runoff originating above Navajo Reservoir and the available water in storage in Navajo Reservoir, for a sharing of the available water in the following manner: The prospective runoff shall be apportioned between the contractors diverting above and those diverting at or below Navajo Reservoir in the proportion that the total normal diversion requirement of each group bears to the total of all normal diversion requirements. In the case of contractors diverting above Navajo Reservoir, each such contract shall provide for a sharing of the runoff apportioned to said group in the same proportion as the normal diversion requirement under said contract

bears to the total normal diversion requirements of all such contracts that have been made hereunder: *Provided*, That for any year in which the foregoing sharing procedure either would apportion to any contractor diverting above Navajo Reservoir an amount in excess of the runoff anticipated to be physically available at the point of his diversion, or would result in no water being available to one or more such contractors, the runoff apportioned to said group shall be reapportioned, as near as may be, among the contractors diverting above Navajo Reservoir in the proportion that the normal diversion requirements of each bears to the total normal diversion requirements of the group. In the case of contractors diverting from or below Navajo Reservoir, each such contract shall provide for a sharing of the remaining runoff together with the available storage in the same proportion as then normal diversion requirement under said contract bears to the total normal diversion requirements under all such contracts that have been made hereunder.

"The Secretary shall not enter into contracts for a total amount of water beyond that which, in his judgment, in the event of shortage, will result in a reasonable amount being available for the diversion requirements for the Navajo Indian irrigation project and the initial stage of the San Juan-Chama project as specified in sections 615jj and 615pp of this title.

"No long-term contract, except contracts for the benefit of the lands and for the purposes specified in sections 615jj and 615pp of this title, shall be entered into for the delivery of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries, as aforesaid, until the Secretary has determined by hydrologic investigations that sufficient water to fulfill said contract is reasonably likely to be available for use in the State of New Mexico during the term thereof under the allocations made in articles III and XIV of the Upper Colorado River Basin compact, and has submitted such determination to the Congress of the United States and the Congress has approved such contracts: *Provided*, That nothing contained in the foregoing shall be construed to forbid the Secretary from entering into temporary water

supply contracts in the San Juan River Basin for any year in which he determines that water legally available for use in the upper basin of the Colorado River system would otherwise not be used there and is not needed to fulfill the obligations of the upper division States with respect to delivery of water at Lee Ferry.

"(b) If contracts are entered into for delivery from storage in Navajo Reservoir of water not covered by subsection (a) of this section, such contracts shall be subject to the same provision for sharing of available water supply in the event of shortage as in the case of contracts required to be made pursuant to subsection (a) of this section.

Sec. 615uu(a), (b):

"(a) The use of water, including that diverted from the Colorado River system to the Rio Grande Basin, through works constructed under authority of sections 615ii-615yy of this title, shall be subject to and controlled by the Colorado River compact, the Upper Colorado River Basin compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act, and the Mexican Water Treaty (Treaty Series 994), and shall be included within and shall in no way increase the total quantity of water to the use of which the State of New Mexico is entitled and limited under said compacts, statutes, and treaty, and every contract entered into under sections 615ii-615yy of this title for the storage, use, and delivery of such water shall so recite.

"(b) All works constructed under authority of sections 615ii-615yy of this title, and all officers, employees, permittees, licensees, and contractees of the United States and of the State of New Mexico acting pursuant thereto and all users and appropriators of water of the Colorado River system diverted or delivered through the works constructed under authority of sections 615ii-615yy of this title and any enlargements or additions thereto shall observe and be subject to said compacts, statutes, and treaty, as hereinbefore provided, in the diversion, delivery, and use of water of the Colorado River system, and such condition and covenant shall attach as a matter of law whether or not set out or referred to in the instrument evidencing

such permit, license, or contract and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming and the users of water therein or thereunder by way of suit, defense or otherwise in any litigation respecting the waters of the Colorado River system.

Sec. 615vv:

"In the operation and maintenance of all facilities under the jurisdiction and supervision of the Secretary of the Interior authorized by sections 615ii-615yy of this title, the Secretary is directed to comply with the applicable provisions of the Colorado River compact, the Upper Colorado River Basin compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act and the treaty with the United Mexican States in the storage and release of water from reservoirs in the Colorado River Basin. In the event of the failure of the Secretary of the Interior to so comply, any State of the Colorado River Basin may maintain an action in the Supreme Court of the United States to enforce the provisions of this section, and consent is given to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise. Pub.L. 87-483, § 14, June 13, 1962, 76 Stat. 101."

Act of March 22, 1968, P.L. 90-272

Act of March 22, 1968, P.L. 90-272; 82 Stat. 52; U.S. Code Cong. & Admin. News at 63 (1968):

"NAVAJO RESERVOIR, NEW MEXICO—WATER DELIVERY CONTRACTS

"PUBLIC LAW 90-272; 82 STAT. 52

[S. J. Res. 123]

"Joint Resolution to approve long-term contracts for delivery of water from Navajo Reservoir in the State of New Mexico, and for other purposes.

"WHEREAS section 11(a) of the Act of June 13, 1962 (76 Stat. 96; Public Law 87-483), provides that: 'No long-term contract, except contracts for the benefit of the lands and for the purposes specified in sections

2 (Navajo Indian irrigation project) and 8 (San Juan-Chama project) of this Act, shall be entered into for the delivery of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries, as aforesaid, until the Secretary has determined by hydrologic investigation that sufficient water to fulfill said contract is reasonably likely to be available for use in the State of New Mexico during the term thereof under the allocations made in articles III and XIV of the Upper Colorado River Basin Compact, and has submitted such determination to the Congress of the United States and the Congress has approved such contracts'; and

"WHEREAS the Secretary has made such determination in conection with the following contracts transmitted to Congress by letter dated November 21, 1967:

	Water diversion (acre-feet)	Estimated water depletion (acre-feet)	Proposed uses
"Public Service Company of New Mexico	20,200	16,200	Thermal-electric generation.
"Southern Union Gas Company	50	50	Pump cooling
Utah Construction and Mining Company	44,000	35,300	Thermal-electric generation.
	64,250	51,550	

"Now, therefore, be it

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:*

"Such contracts are hereby approved by the Congress. The Secretary may enter into amendments thereto which would in his judgment be in the interest of water conservation, but the total water depletion shall not exceed the estimates set forth in this joint resolution.

"Approved March 22, 1968."

Colorado River Basin Project Act

Sections 301(b), (c), and 303(a), (b), (c), (d) of the Colorado River Basin Project Act, 43 U.S.C. §§ 1521(b), (c), 1523(a), (b), (c), (d):

Sec. 1521(b), (c):

"(b) Article II(B) (3) of the decree of the Supreme Court of the United States in Arizona against California (376 U.S. 340) shall be so administered that in any year in which, as determined by the Secretary, there is insufficient main stream Colorado River water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada, diversions from the main stream for the Central Arizona Project shall be so limited as to assure the availability of water in quantities sufficient to provide for the aggregate annual consumptive use by holders of present perfected rights, by other users in the State of California served under existing contracts with the United States by diversion works heretofore constructed, and by other existing Federal reservations in that State, of four million four hundred thousand acre-feet of mainstream water, and by users of the same character in Arizona and Nevada. Water users in the State of Nevada shall not be required to bear shortages in any proportion greater than would have been imposed in the absence of this subsection. This subsection shall not affect the relative priorities, among themselves, of water users in Arizona, Nevada, and California which are senior to diversions for the Central Arizona Project, or amend any provisions of said decree.

"(c) The limitation stated in subsection (b) of this section shall not apply so long as the Secretary shall determine and proclaim that means are available and in operation which augment the water supply of the Colorado River system in such quantity as to make sufficient mainstream water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada.

* * * * *

Sec. 1523(a), (b), (c), (d):

"(a) The Secretary is authorized and directed to continue to a conclusion appropriate engineering and economic studies and to recommend the most feasible plan for the construction and operation of hydroelectric generating and transmission facilities, the purchase of electrical energy, the purchase of entitlement to electrical plant capacity, or any combination thereof, including participation, operation, or construction by non-Federal entities, for the purpose of supplying the power requirements of the Central Arizona Project and augmenting the Lower Colorado River Basin Development Fund: *Provided*, That nothing in this section or in this Act contained shall be construed to authorize the study or construction of any dams on the main stream of the Colorado River between Hoover Dam and Glen Canyon Dam.

"(b) If included as a part of the recommended plan, the Secretary may enter into agreements with non-Federal interests proposing to construct thermal generating powerplants whereby the United States shall acquire the right to such portions of their capacity, including delivery of power and energy over appurtenant transmission facilities to mutually agreed upon delivery points, as he determines is required in connection with the operation of the Central Arizona Project. When not required for the Central Arizona Project, the power and energy acquired by such agreements may be disposed of intermittently by the Secretary for other purposes at such prices as he may determine, including its marketing in conjunction with the sale of power and energy from Federal powerplants in the Colorado River system so as to produce the greatest practicable amount of power and energy that can be sold at firm power and energy rates. The agreements shall provide, among other things, that—

"(1) the United States shall pay not more than that portion of the total construction cost, exclusive of interest during construction, of the powerplants, and of any switchyards and transmission facilities serving the United States, as is represented by the ratios of the respective capacities to be provided for the United States therein to the total capacities of such facilities.

The Secretary shall make the Federal portion of such costs available to the non-Federal interests during the construction period, including the period of preparation of designs and specifications, in such installments as will facilitate a timely construction schedule, but no funds other than for preconstruction activities shall be made available by the Secretary until he determines that adequate contractual arrangements have been entered into between all the affected parties covering land, water, fuel supplies, power (its availability and use), rights-of-way, transmission facilities and all other necessary matters for the thermal generating powerplants;

"(2) annual operation and maintenance costs shall be apportioned between the United States and the non-Federal interests on an equitable basis taking into account the ratios determined in accordance with the foregoing clause (1): *Provided, however,* That the United States shall share on the foregoing basis in the depreciation component of such costs only to the extent of provision for depreciation on replacements financed by the non-Federal interests;

"(3) the United States shall be given appropriate credit for any interests in Federal lands administered by the Department of the Interior that are made available for the powerplants and appurtenances;

"(4) costs to be borne by the United States under clauses (1) and (2) shall not include (a) interest and interest during construction, (b) financing charges, (c) franchise fees, and (d) such other costs as shall be specified in the agreement.

"(c) No later than one year from September 30, 1968, the Secretary shall submit his recommended plan to the Congress. Except as authorized by subsection (b) of this section, such plan shall not become effective until approved by the Congress.

"(d) If any thermal generating plant referred to in subsection (b) of this section is located in Arizona, and if it is served by water diverted from the drainage area of the Colorado River system above Lee Ferry, other provisions of existing law to the contrary notwithstanding, such consumptive use of water shall be a part of the fifty thousand acre-feet per annum ap-

portioned to the State of Arizona by article III (a) of the Upper Colorado River Basin Compact (63 Stat. 31)."

Colorado River Compact

(H. Doc. 717, 80th Cong., pp. A19, A21)

"ARTICLE III

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

* * * * *

"(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

"(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses."

"ARTICLE VIII

"Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

"All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate."

Upper Colorado River Basin Compact

(H. Doc. 717, 80th Cong., p. A169)

"ARTICLE III

"(a) Subject to the provisions and limitations contained in the Colorado River Compact and in this Compact, there is hereby apportioned from the Upper Colorado River System in perpetuity to the States of Arizona, Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use of water as follows:

"(1) To the State of Arizona the consumptive use of 50,000 acre-feet of water per annum.

"(2) To the States of Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use per annum of the quantities resulting from the application of the following percentages to the total quantity of consumptive use per annum apportioned in perpetuity to and available for use each year by Upper Basin [*sic*] under the Colorado River Compact and remaining after the deduction of the use, not to exceed 50,000 acre-feet per annum, made in the State of Arizona.

State of Colorado ..... 51.75 percent,
State of New Mexico .... 11.25 percent,
State of Utah ..... 23.00 percent,
State of Wyoming ..... 14.00 percent."

Supreme Court, U. S.
FILED
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SUPPLEMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1380

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

No. 73-1666

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Petitioners*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

No. 73-1667

FEDERAL POWER COMMISSION, *Petitioner*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents*

Supplement to Brief Filed by Arizona Public Service Co., et al.

(See list of attorneys on inside cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

NORTHCUTT ELY
FREDERICK H. RITTS
Law Offices of Northcutt Ely
Watergate 600 Building
Washington, D. C. 20037
and
HARRY A. POTH, JR.
PEYTON G. BOWMAN, 3RD
Reid & Priest
40 Wall Street, New York,
N.Y. 10005

1701 K Street, N. W.
Washington, D. C. 20006
Attorneys for all Petitioners

NICHOLAS H. POWELL
Snell & Wilmer
400 Security Building
Phoenix, Arizona 85004
Attorneys for Arizona Public Service Company

WILLIAM DUNCAN
Kemp, Smith, White, Duncan & Hammond
P. O. Box 2800
El Paso, Texas 79999
Attorneys for El Paso Electric Company

BURT S. PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power

RALPH GUY WESSON
Assistant City Attorney
111 North Hope Street
Los Angeles, California 90051
Attorneys for Department of Water and Power, City of Los Angeles

M. GENE MATTEUCCI
P. O. Box 230
Las Vegas, Nevada 89101
Attorney for Nevada Power Company

REX E. LEE
2840 Iroquois Drive
Provo, Utah 84601
Jennings, Strouss & Salmon
111 W. Monroe Street
Phoenix, Arizona 85003
Attorneys for Salt River Project Agricultural Improvement and Power District

SHERMAN CHICKERING
C. HAYDEN AMES
EDWARD P. NELSEN
ALLAN J. THOMPSON
Chickering & Gregory
111 Sutter Street
San Francisco, California 94104
Attorneys for San Diego Gas & Electric Company

JOHN R. BURY
Assistant General Counsel
P.O. Box 800
Rosemead, California 91770
Attorney for Southern California Edison Company

L. V. ROBERTSON, JR.
General Attorney
Tucson Gas and Electric Company
220 West Sixth Street
Tucson, Arizona 87503

DONALD E. DICKERMAN
Holesapple, Conner, Jones, McFall & Johnson
P.O. Box 310
Tucson, Arizona 85702
Attorneys for Tucson Gas & Electric Company

SIDNEY G. BAUCOM
ROBERT GORDON
P. O. Box 899
Salt Lake City, Utah 84110
Attorneys for Utah Power & Light Company

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ITEM 1

LEGISLATIVE HISTORY OF THE SURPLUS WATER CLAUSE OF SECTION 4(e) OF THE FEDERAL POWER ACT, 16 U.S.C. § 797(e)

Prepared by Counsel for Arizona Public Service Co., et al.*

* Mr. Ely wishes to acknowledge the contribution made to this study by his associates, Frederick H. Ritts, Robert F. Pietrowski, and members of his staff, Messrs. Robert E. Bartkus, Michael L. Michael, Lawrence E. Strickling, and Keith M. Werhan.

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I. 1888-1914

The history of the "surplus water" clause encompasses many more years than just the history of the Federal Water Power Act. Before passage of the comprehensive water power act in 1920, Congress enacted legislation, on a project-to-project basis, granting the Secretary of War authority to lease surplus water at federal dams. The earliest act where surplus water was leased was in an appropriation bill for rivers and harbors passed in 1888. Act of Aug. 11, 1888, ch. 860, 25 Stat. 400. (Perhaps the earliest mention of "surplus water" is in a deed of property on the Fox River in Wisconsin to the United States by the Green Bay and Mississippi Canal Co. between 1870 and 1872. The deed is cited but not quoted in *Kaukauna Water Power Co.* v. *The Green Bay & Mississippi Canal Co.*, 142 U.S. 254, 259 (1891).) The following provision was made concerning the Muskingum River in Ohio:

> "[T]he Secretary of War is hereby authorized and empowered to grant leases or licenses for the use of the water powers on the Muskingum River at such rate and on such conditions and for such periods of time as may seem to him just, equitable, and expedient: *Provided*, That the leases or licenses shall be limited to the use of the surplus water not required for navigation." Act of Aug. 11, 1888, ch. 860, 25 Stat. 400, 417.

Two years later, a similar provision was passed concerning the Green and Barren Rivers in Kentucky:

> "The Secretary of War is hereby authorized and empowered to grant leases or licenses for the use of the water powers on the Green and Barren Rivers at such a rate and on such conditions and for such periods of time as may seem to him just,

> equitable, and expedient; said leases not to exceed the period of twenty years: *Provided,* That the leases or licenses shall be limited to the use of the surplus water not required for navigation." Act of Sept. 19, 1890, ch. 907, 26 Stat. 426, 447.

Although not limited by the language of the statutes, the only leases made were for water power developed at the dam site. In 1911 the War Department reported it was leasing water power at seven dams on the Muskingum River, two dams on the Barren River and one dam on the Green River. 47 CONG. REC. 4008 (1911). Furthermore, the charges were based on the amount of horsepower developed at the dam. *Id.*

The phrase "not required for navigation" in reference to surplus water indicates that the water of a river could be divided into two portions—one, the amount needed to insure unimpeded navigation and two, the remainder, which would be called "surplus water."

A 1902 act authorizes leases of surplus water in the Cumberland River in Tennessee, but expressly limits them to the water power created by Lock and Dam Numbered One:

> "And the Secretary of War is hereby authorized, in his discretion, to grant leases or licenses to the highest responsible bidder for the use of the water power created by said dam . . . *Provided,* that any lease or license so granted shall be limited to the use of the surplus water not required for navigation . . . ." Act of June 13, 1902, ch. 1079, 32 Stat. 331, 358, *as amended* Act of June 28, 1902, ch. 1299, 32 Stat. 408, 409.

These three acts all involve the leasing or licensing of surplus water at a federal navigation dam after the

dam has been constructed. A second type of government dam is one constructed by a private party who, in consideration for deeding the dam and locks to the government, receives a lease of the water power. This distinction is emphasized by Senator Burton in 1913:

> "They [water power acts] are of three classes. The first class comprises dams constructed by acts of Congress where surplus water, not needed for navigation, has been leased for water-power purposes . . . . There is a second class in which it has been provided that where dams, or dams and locks, are to be constructed in the future by the Government, the water power created incidentally thereto shall be leased under the direction of the Secretary of War . . . . A third class comprises acts of Congress granting permission to lessees to construct dams in navigable streams subject to various conditions." 49 CONG. REC. 2601-03 (1913).

The Act of April 26, 1904, ch. 1605, 33 Stat. 309, granted permission to the city of Chattanooga, Tennessee, to construct a lock and dam across the Tennessee River, which would then be deeded to the United States.

Section 4 contained the following provision:

> "That in consideration of the construction of said lock and dam, free of cost to the United States . . . the United States hereby grants to the municipality, corporation, company, or persons constructing said lock and dam under the provisions of this Act such rights as it possesses to use the water power produced by said dam, and to convert the same into electric power or otherwise utilize it for a period of ninety-nine years . . . ." *Id.*

Nowhere in this act or in two similar acts passed the following year, Act of February 9, 1905, ch. 566, 33

Stat. 712, and Act of Mar. 3, 1905, ch. 1482, 33 Stat. 1117, 1132, is "surplus water" or the leasing of "surplus water" ever mentioned.

Four statutes enacted by Congress in 1906 and 1907 do contain the term "surplus water." However, the term is not used in the leasing clause, that is, there is no lease of the surplus water itself, as there was in the earlier bills. Instead the term is used to indicate the restrictions placed on the use of water by a privately built dam and power station.

The Act of March 6, 1906, ch. 517, 34 Stat. 52, authorizing the construction of dams in the Tennessee River at Muscle Shoals, Alabama, contained the following restriction:

> "*And provided further,* That said dam or dams and works shall be limited only to the use of the surplus water of the river, not required for the navigation of the Muscle Shoals Canal or the Tennessee River . . . ." *Id.*

An identical provision was included in the authorization of the North Mississippi Traction Co. to erect a dam across the Bear River in Mississippi:

> "*And provided further,* That said dam or dams and works shall be limited only to the use of the surplus water of the river, not required for the navigation of Bear River . . . ." Act of April 23, 1906, ch. 1660, 34 Stat. 130,

in the dam authorization act for the Coosa River at Lock Two, Alabama:

> "*And provided further,* That said dam or dams and works shall be limited only to the use of the surplus water of the river, not required for the navigation of the Coosa River . . . ." Act of May 9, 1906, ch. 2438, 34 Stat. 183, 184,

and in the Act of March 4, 1907, ch. 2912, 34 Stat. 1288 concerning the river at Lock Twelve:

> "*Provided further,* That said dam and appurtenant works shall be limited to the use of the surplus water only of the river not required for the navigation of the Coosa River . . . ." *Id.*

The addition of the words "of the river" does not change the meaning of the term "surplus water." The House Report on the Coosa River, Lock Twelve bill states:

> "The bill grants to the company the right to the use of the surplus water for power purposes . . . ." H.R. REP. No. 7648, 59th Cong., 2d Sess. 1 (1907). See S. REP. No. 6948, 59th Cong., 2d Sess. 1 (1907).

This is essentially the same usage of the term as was made in the early bills. Surplus water still applies only to water power developments and then only in reference to developments at the dam site. The major difference between these four acts and the three early bills is that in the latter statutes, the dams and locks had already been constructed. Surplus water, if measured at the dam site, was a readily identifiable quantity because the amount of water necessary to operate the locks was known. However, in these later situations, the federal government only reserved the right to later build a lock at the dam. The government needed to insure that there would be water available in the future for the navigation locks and therefore restricted the dam builder to the use of the surplus water for his water power generation. This clause reserved the government's right to a share of the water in the future for navigation purposes and prevented the builder from making too large an investment in his power station by basing it on utilizing the entire flow of the stream.

A 1906 bill created a commission which was to report to the Secretary of War:

> ". . . concerning the use of surplus water which shall not be needed for the purposes of navigation flowing over the dams now under construction by the United States in the Mississippi River between the cities of Saint Paul and Minneapolis, Minnesota." Act of June 25, 1906, ch. 3530, 34 Stat. 456.

The language of this bill lends further support to the definition of surplus water as being that quantity of water over and above the requirements for navigation at the site of the dam. Furthermore, although the title of the first section of the bill does not limit the scope of the inquiry, Section 2 states that the commission is to report only on the following use of surplus water:

> "Whether there will be any surplus water flowing over said dams not needed for the purposes of navigation which might be available for mechanical or commercial power." *Id.* at 457.

The committee report makes it clear that the water will be used only in a water power project:

> "This commission is directed to make a thorough investigation of the possibilities of making use of this water power for the benefit of the Government." H. R. Rep. No. 4914, 59th Cong., 1st Sess. 3 (1906).

The term "surplus water" next appeared in an appropriation act for rivers and harbors in 1909. The usage was similar to that in the first three bills:

> "And the Secretary of War is hereby authorized and empowered to grant leases or licenses for the

> *use of the water power created by the government dam* on the Wabash River at Mount Carmel, Illinois, at such a rate, and on such conditions, and for such periods of time, as may seem to him just, equitable, and expedient, *the said leases or licenses to be limited to the use of the surplus water* not required for navigation, and to a period not exceeding twenty years . . . ." Act of March 3, 1909, ch. 264, 35 Stat. 815, 819 (emphasis added).

Thus, for over twenty years, the meaning of the term had remained virtually unchanged.

The 62d Congress in 1911 considered a bill, S. 943, which originally was to authorize the Secretary of War to enter into a contract with the Birmingham Water, Light and Power Co. for the improvement of navigation and development of water power on the Black Warrior River in Alabama. The bill as passed omitted all the provisions relating to water power and was essentially a bill for the improvement of navigation. Act of August 22, 1911, ch. 41, 37 Stat. 32. The omitted Section 5 provided that the company:

> ". . . shall have the right to construct, maintain, own, and operate . . . electrical power stations and other structures for the development of water power for industrial and other purposes, and for converting to its own use, benefit, and profit *the power created with the surplus* water not needed for lockage, including the right to sell, lease, or otherwise dispose of said power. . . ." 47 CONG. REC. 3771 (1911) (emphasis added).

The Acting Chief of Engineers, Edward Burr, described this section of the bill as containing:

> ". . . the exclusive grant to the company of the right to use and dispose of the surplus power,

> not required for the purposes of navigation, which may be created or developed by said works." H.R. REP. No. 133, 62d Cong., 1st Sess. 3 (1911).

He equates surplus water with surplus power, and navigation with lockage. Thus, the amount of water required for navigation is the same as the quantity of water required for locks. Surplus water is determined by the measurement of water needs at the dam itself.

Senator Johnston of Alabama introduced a bill in the 2d Session of the 62d Congress entitled: "A Bill [t]o authorize the Secretary of War to lease the surplus water created by any improvement on navigable streams, and for other purposes." S. 7223, 62d Cong., 2d Sess. (1912).

The title of the bill does not restrict the scope of the bill to any particular uses of surplus water nor does it indicate any limits on the definition of "surplus water." Therefore, it might be assumed that the bill deals with "surplus water" as commonly defined and its normal uses. The language of the bill clearly indicates, first, that surplus water is to be leased for water power, and second, that the surplus water is to be utilized at the dam site:

> "[T]he Secretary of War [is] authorized in his discretion, to issue permits in the following cases:
>
> "First. When any corporation or person, being authorized by the State, desires to erect power stations upon any navigable river within the United States and connect the same with any Government dam, now or hereafter built, or under the course of construction, in aid of navigation, the Secretary of War may grant such permission, and such corporation or person . . . may generate and use the power therefrom." *Id.*

The corporation or person would have to pay a charge to the government:

> ". . . which must be governed by the amount of horsepower that can be developed and marketed at the particular dam or dams . . . ." *Id.*

The bill was referred to committee and no floor action was ever taken on it. But it is useful in indicating that the common historical usage of the term "surplus water" was only in relation to water power and only in reference to power developed at the dam site.

II. 1914-1915 (63d Congress)

In 1914 Congress for the first time considered legislation with the purpose of regulating water power development in a general fashion. In the Sixty-third Congress, Second Session, Congressman Adamson introduced H.R. 16053 and Congressman Ferris introduced H.R. 16673. The Adamson bill provided for the control of water power on navigable streams and the Ferris bill pertained to water power development on public lands. See 51 CONG. REC. 12676 (1914) (remarks of Congressman Kelly). See also *id.* at 11403, wherein Congressman Underwood remarked: "[The Adamson] bill is limited in its terms to the navigable waters of the United States, and does not affect . . . the public lands . . . .The boundary of this bill, to begin with and to end with, is the navigable streams of the United States." The general purpose of the Ferris bill, H.R. 16673, was "to reserve in perpetuity to the people of the United States in fee in all public lands available for hydroelectric purposes and to provide a practical system for leasing such lands . . . ." H.R. REP. No. 842, 63d Cong., 2d Sess. 1 (1914). The leasing authority in the Ferris bill was granted to the Secretary of the In-

terior in Section 1 and included "constructing, maintaining, and operating dams, water conduits, reservoirs, power houses, transmission lines, and other works necessary or convenient to the development, generation, transmission, and utilization of hydroelectric power. . . ." *Id.* at 2. The bill, however, as was typical of public lands legislation, did not include "surplus water" language and is not helpful in analyzing the clause in Section 4(e) of the Federal Water Power Act of 1920.

Whether the primary purpose of the Adamson bill, H.R. 16053, was to promote navigation or the development of water power upon navigable waters was a matter of some controversy. The Committee Report on H.R. 16053 stated, "we conceive the prime consideration of the Government to be the promotion of navigation. . . ." H.R. REP. No. 592, 63d Cong., 2d Sess.; 51 CONG. REC. 11068, 11069 (1914). Congressman Adamson insisted during the debate that:

> " . . . this bill is a navigation bill. A great many people talk about it as a water-power bill, and the most that is said about it treats it as a water-power bill.
>
> "This bill is limited strictly to the navigable streams of the United States, and its paramount purpose is to develop and maintain navigation in those navigable streams." *Id.* at 11417.

See also *id.* at 11429, wherein Congressman Adamson further stressed that "this is a navigation bill and not a water-power bill." Despite Mr. Adamson's insistence, many congressmen remained unconvinced and viewed navigation as the jurisdictional peg upon which Congress was to assert control over water power development. Thus, Congressman Lenroot declared that H.R. 16053 "both in its present form and with the amendments proposed, is a water-power bill in fact, although

navigation is the basis of our jurisdiction." *Id.* at 12328. He further stated that:

> "... while it is clear that the paramount purpose of the bill before us is to aid water-power companies and not navigation, I would not condemn it for that reason. On the contrary, the development of water powers upon many of our streams is far more important than the development of navigation; and while our jurisdiction rests upon the right to control navigation, sometimes navigation itself should be considered as a minor and incidental matter as compared with the great public benefit flowing from the proper development of our water powers.
>
> "So, . . . this bill ought to be discussed as a water-power bill, for that is what it is, and I propose to discuss it as such." *Id.* at 12329.

Congressman Lieb sided with Mr. Lenroot, declaring:

> "I do not believe that this bill will 'first and primarily, promote navigation.' I am firmly convinced that that very desirable result will be subordinated, and that the first and primary effort will be to promote water power for private gain." *Id.* at 13030.

House consideration of the bill supported the Lenroot view, for debate centered on water power development. This controversy supports the notion that the Sixty-third Congress was concerned only with regulating one aspect of power development—water power.

Section 14 of the Adamson bill contained a provision dealing with surplus water, which, as introduced and reported to the House floor read:

> "That the Secretary of War, upon the advice and with the approval of the Chief of Engineers,

may lease to any applicant having complied with the laws of the State in which the dam is constructed or to be constructed by the United States, *the right to develop power from the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant,* and owned by the United States, and on such terms as may be deemed by the Secretary of War, and Chief of Engineers for the best interests of the United States, and in awarding such lease preference shall be given to the applicant whose plans are deemed by any action of Congress or by the Secretary of War and Chief of Engineers to be best adapted to conserve and utilize in the public interest the navigation and water power resources of the region, and all such leases and parties thereto and the terms and conditions thereof shall be reported annually to Congress." *Id.* at 11415 (emphasis added).

The report of the House Committee on Interstate and Foreign Commerce stated that:

"Section 14 is a new section authorizing the Secretary of War, with the approval of the Chief of Engineers, to lease to any applicant who has complied with the laws of the State in which the dam may be located any surplus power developed by a dam that is constructed or owned by the United States for the purposes of navigation. In making these leases preference shall be given to the applicant whose plan is approved by any act of Congress or by the Secretary of War and Chief of Engineers as best adapted to the interest of navigation or to conserve the water-power resources of the region. All such leases and the parties thereto and the terms and conditions thereof shall be reported annually to Congress." *Id.* at 11070.

Further, the report stated:

> "Yielding to the pressure from many directions we have included in the present bill authority for the Secretary of War to accommodate communities and derive some revenue for the Government from projects constructed wholly at the expense of the Government by leasing on satisfactory terms, with proper safeguards, the surplus water not needed for navigation at such projects. For the same reason we have also included a provision permitting the use of public lands for dam projects on terms to be prescribed by the Secretary of War where the structure proposed is to be in a navigable stream, for be it remembered that this bill deals only with portions of streams which are only theoretically navigable, but which could be made navigable, as we believe, under the operation of the legislation proposed." *Id.* at 11069.

Remarks made by congressmen during the general House debate on H.R. 16053 pertaining to Section 14 in general, and the surplus water clause in particular, support the view that only plants which used surplus water to produce water power were reached. Congressman Mann states that Section 14 "provides for leasing surplus water power owned by the United States." *Id.* at 11402. Mr. Mann further elaborates:

> "Section 14 provides that the Secretary of War shall lease to any applicant the right to develop power from the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed.
>
> "We have many navigation dams in the United States. At many of them there is surplus water which may be used for the development of water power, and we authorize the Secretary of War to lease that surplus water power and to make charges for it." *Id.* at 11403.

Finally, Congressman Mann interprets the section as conveying "by lease the use of surplus water power at dams which we have on navigable streams. That is the purpose of it." *Id.* at 11404. In decrying what he perceived to be defects in the Adamson bill, Congressman Lenroot stated:

> "Section 14 of the bill permits the Secretary of War to lease the surplus water power created by any Government dam. No restrictions are placed upon the Secretary; the lease may be for 99 years or 999 years; and not only that, but when Government dams are being constructed the Secretary of War, without consulting Congress, may take in as a partner with the United States in the undertaking a water-power company, and agree with it as to what its share of the partnership contribution shall be. He is required to report to Congress his action after he has acted, but not before." *Id.* at 12330.

Opposition by conservationists in the House brought about a remodeling of H.R. 16053, which was presented to the House on July 20, 1914. *Id.* at 12406-07. Section 14 was changed so as to remedy the defect pointed to by Congressman Lenroot above. The surplus water clause, however, remained unchanged. The revised Section 14 read as follows:

> "That the Secretary of War, upon the advice and with the approval of the Chief of Engineers, may lease to any applicant having complied with the laws of the State in which the dam is constructed or to be constructed by the United States, *the right to develop power from the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant*, and owned by the United States, and on such terms as may be deemed by the Secretary of War and Chief

> of Engineers for the best interests of the United States, and in awarding such lease preference shall be given to the applicant whose plans are deemed by any action of Congress or by the Secretary of War and Chief of Engineers to be best adapted to conserve and utilize in the public interest the navigation and water-power resources of the region: [*Provided*, That no lease shall be made to any private corporation or applicant operating for private profit for a longer term than 50 years, and that the provisions of this act, so far as applicable, shall be made a part of the terms and conditions of any such lease], and all such leases and the parties thereof and the terms and conditions thereof shall be reported annually to Congress." *Id.* at 12407 (emphasis added).

General debate on the revised H.R. 16053 indicates that Section 14 and the surplus water clause were viewed by congressmen as reaching no further than water power plants. Prior to offering his own bill, H.R. 17854, as a substitute to the Adamson bill, Congressman Smith discussed what he perceived as the defects of H.R. 16053. Relevant to Section 14, Mr. Smith states:

> "A flat 50-year grant, at least—it may work out much longer—is given to every grantee of Federal water power, with no option of the Government to modify the term; while in many of our States, as well as other progressive countries, where hydroelectric development is most successful, the grant runs for periods of 20 to 40 years and present acts give the Government a leeway of option under the phrase: 'No longer than 50 years.'
>
> * * * * *
>
> "As stated by the authors and sponsors of the bill, it has one prime purpose and that is to attract and interest private capital. It places commer-

> cial use and purpose first and foremost. It is true that in section 14, which pertains to leases of dams built by the Government, preference is given to the lessee who is able to conserve navigation and the water-power development. But, of course, that goes without saying, because the source of all Federal control flows out of the constitutional authority of Congress over navigation." *Id.* at 12577-79.

See also Mr. Smith's reference to the applicability of H.R. 16053 to "surplus water power," *id.* at 12578.

The substitute to H.R. 16053 proposed by Mr. Smith left unchanged the concept that surplus water was water used for hydro-power generation by incorporating the same surplus water clause contained in Section 14 of the Adamson bill. Thus, Section 18 stated:

> "That the commission may lease to any applicant embraced in section 2 hereof, who has complied with the laws of the State in which the dam is constructed or to be constructed by the United States, *the right to develop power from the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant,* and owned by the United States, and on such terms as may be deemed by the commission for the best interests of the United States, and in awarding such lease preference shall be given to the applicant whose plans are deemed by the commission best adapted to conserve the public interest as provided in section 3 hereof, and all such leases and the parties thereto and the terms and conditions thereof shall be subject to the control and regulations of the commission under the general provisions of this act." *Id.* at 12586 (emphasis added).

In comparing his bill to H.R. 16053, Congressman Smith remarked, "Section 18 governs the lease of dams built by the Government, according to the provisions of the original [Section 14 of H.R. 16053], except that in cases of contesting applications for the lease . . . navigation, public use, and industrial use take precedence over power for commercial sale." *Id.* at 12588. See also *id.* at 12584, wherein Congressman Smith stated that H.R. 16053 granted the Secretary of War power to "regulate hydroelectric projects."

Further evidence of the intended scope of the surplus water clause in Section 14 of the Adamson bill is found in the Extension of Remarks by Congressman Brown submitted on July 20, 1914, the day the "new" Adamson bill was presented to the House floor. *Id.* at 767-68 (Appendix). Congressman Brown stated that the effort behind the bill "obviously is to induce capital to build dams across navigable streams in aid of navigation for the sake of the profit to be earned in selling light and power generated from the surplus waters of the streams." *Id.* at 767. Addressing himself more specifically to Section 14, he remarked:

> "Section 14 is entirely in keeping with the rest of the bill. It permits the Secretary of War and the Chief of Engineers to lease the right to develop power from the surplus water flowing over any dam, present or future, for any length of time, with or without consideration." *Id.* at 768.

Other references made during debate regarding Section 14 indicate that it was intended merely to reach water power facilities. While considering a proposed amendment by Congressman Lindbergh to Section 6 which would bring within that section "lessees under section 14 of this act," *id.* at 13031, it was noted that Section

14 "is a provision for the leasing of the power from the reservoirs. . . ." *Id.* at 13032 (remarks of Congressman Lindbergh). In the *Christian Science Monitor* of May 6, 1914, included in the *Record* by Congressman Stevens of New Hampshire, *id.* at 13249-51, an article appeared which analyzed and compared the various "conservation legislation pending before the second session of the Sixty-third Congress." In listing the basic provisions of the Adamson bill, the *Monitor* stated that the bill provides that "[s]urplus power developed by [a] Government plant may be leased." *Id.* at 13250.

The debate surrounding the Sherley amendment to Section 2 is particularly helpful in ascertaining the intended scope of the surplus water clause in Section 14. As revised and presented to the House, Section 2 read:

> "That as a part of such approval such conditions and stipulations may be imposed as the Secretary of War and the Chief of Engineers may deem necessary to protect the present and future interests of the United States, which may include the condition that the persons constructing or maintaining such dam shall construct, maintain, and operate in connection therewith, without expense to the United States, a lock or locks, booms, sluices, or any other structure or structures which the Secretary of War and the Chief of Engineers or Congress then may deem necessary in the interests of navigation, in accordance with plans made a part of such approval; and also that in case such facilities of navigation shall not be made a part of such original approval and construction, whenever Congress shall deem such facilities necessary, the persons owning such dam shall convey to the United States, free of cost title to such land as may be required for such constructions and approaches, and shall grant to the United States free water

> power or power generated from water power for building and operating such constructions, and in such original approval, at the discretion of the Secretary of War and Chief of Engineers, may be required to maintain and operate such lock without expense to the United States [: *Provided,* That whenever Congress has heretofore provided, either directly or indirectly, through any official or department of the United States Goverment, for the construction, maintenance, and operation of a lock, free of cost to the United States, as may be deemed necessary for navigation by the Secretary of War and Chief of Engineers in any dam in navigable waters authorized by law at the date of passage of this act, in all such cases such obligation shall continue to be of full force and effect]." *Id.* at 12406.

Congressman Sherley proposed to add to the end of the section the following:

> "The Secretary of War may provide as a condition of such approval for the payment to the United States of reasonable annual charges for the benefits that accrue to the grantee by the authority given under this act, and at the end of 20 years, and every 10 years thereafter, the Secretary of War may readjust the annual charges as may then be just and reasonable." *Id.* at 12759.

This amendment spurred vigorous debate and provided a vehicle for much discussion of the nature of both the surplus water clause in Section 14 and the Supreme Court decision in *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U.S. 53 (1913).

House consideration of the Sherley amendment to Section 2 of the Adamson bill demonstrates that use of the *Chandler-Dunbar* decision to support a reading of

the surplus water clause to reach non-water power uses is unjustified. Congressman Stevens of Minnesota stated:

> "All it [the *Chandler-Dunbar* decision] says is this, that the excess power not needed for navigation from a future dam constructed for navigation under authority of Congress, owned by the Government, may be sold; and that is exactly what we have been contending for." 51 CONG. REC. 12775 (1914).

Congressman Adamson made an ambiguous reference to the scope of the Section 14 leasing power stating that "we have provided in Section 14 of the bill, in strict accordance with the *Chandler-Dunbar* case, that the Secretary of War may lease any water at any Government construction not needed for navigation." *Id.* at 12893. Later in this speech, however, Mr. Adamson made it clear he was referring to "the use of the surplus water for hydroelectric purposes." *Id.* It is clear that Congressman Adamson viewed Section 14 as providing for federal government leases of water power. *Id.* at 12894. Finally, Congressman Kent stated that "[t]he *Chandler-Dunbar* decision only clinches what has long been held—that the Federal Government can go onto the rivers, put in dams, and do whatever it chooses to do with the resultant power." *Id.* at 12905.

Comments by congressmen during the general debate on the Adamson bill support the view that the bill, in its entirety, was intended to reach no further than hydro-power developments. Congressman Smith of New Hampshire pointed out at four points in one speech before the House that "the prime object of [the Adamson] bill is to enlist private capital in hydroelectric development." *Id.* at 12576. Congressman

Kelly asserted that H.R. 16053 provided "for control of water power on navigable streams. . . ." *Id.* at 12676. Mr. Kelly later attacked the bill for being contrary to "sound water-power policy" in that it was "apparently founded on the principle of encouraging private enterprises to develop water power and for the sake of that development to sacrifice the public interest." *Id.* Congressman Lenroot opposed the Adamson bill on the ground that it contained too many concessions to "water-power companies," see *id.* at 12330. Congressman Lonergan supported H.R. 16053 asserting:

> "This water-power controversy has been one of long standing. The real purpose of the present bill and the real solution of the problem is to serve the public interest; to safeguard the people against any overcharge for power; to prevent illegal combinations in restraint of trade and at the same time to permit and encourage the investment of capital in the development of water-power projects in order that the vast amount of hydroelectric power now being wasted in this country can be immediately utilized.
>
> * * * * *
>
> "It is now time to pass constructive legislation which will enable the development of these water powers on terms fair to the public and to private capital." *Id.* at 12668-69.

In addition to general remarks pertaining to the nature of the Adamson bill, several congressmen explicitly distinguish between steam power and water power when addressing themselves to the intended scope of the bill. Congressman Underwood, during general House debate on H.R. 16053, discussed the production of coke in by-product coke ovens, in which the waste gases produce steam power at approximately one-half

the cost of hydroelectric power. *Id.* at 12336. Mr. Underwood then stated, "Thus we find a competition between cheaper steam power produced by waste gases from by product coke ovens and hydroelectric power, which competition exists as an economic fact and can not be regulated by law." *Id.* This competition could be regulated, of course, if the bill pending before Congress sought to regulate steam power plants as well as water power plants. Congressman Bryan brings the distinction between steam power and water power into a sharper focus in the context of his discussion of the rate regulation provision in H.R. 16053:

> "The rate must be uniform for electric energy in a given locality, however produced. The people own a power that can produce energy, say, at $1 per unit, whatever unit you may use. The cheapest competitor to *this power* is steam, which costs, say, $3 per unit. This great difference in costs makes the water power very valuable to the public." *Id.* at 12593 (emphasis added).

Congressman Stevens of Minnesota dealt with what he perceived to be the factors affecting the price of power at some length, maintaining that the price of "this power" was determined by "the competition with others in that same region." *Id.* at 12695. The "other" type of power referred to was steam power. *Id.* Similarly, it was argued by Congressman Rainey that the charges imposed upon the water-power companies would:

> ". . . not have any effect on the consumer of electrical power. It will not increase the cost to him, because the cost of electrical power will be controlled by the cost of steam power, and because the cost of producing steam power is always higher." *Id.* at 12777.

Finally, the following statement by Congressman Lenroot demonstrates that the Congress is concerned with regulating hydro-power development, and concerned with peculiar problems of power:

> "Regulation of water power . . . is not possible to the same extent or in the same way that regulation of *other public utilities* is, because every other public utility, a street railway or an electric-light company, furnishing their power by steam, is unlimited in capacity to furnish power. They can be compelled by State or sovereign authority to furnish such utilities and such service as the market demands. That is not true with reference to a water-power company.
>
> * * * * *
>
> "The usual standard of a fair rate is a reasonable return on the value of the property after paying operating expenses; but will that apply in the case of the water-power company? No; not necessarily, because there is another element there to be considered, and that is where you have . . . 50,000-horsepower users and the water-power companies can only furnish 10,000 horsepower, then the question comes, Will it not be a discrimination that we give four-fifths of the users—or allow one-fifth of the users to get their power at one-half the price that the four-fifths pay? And that must be taken into consideration.
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> * * * * *
>
> "... any public-utility commission or the Secretary of War, if he has jurisdiction, will take into consideration that other element, and the result would be, in every case where there is not water power sufficient to furnish the entire market, that the cost of the water power will be determined by the cost of the steam power. . . ." *Id.* at 12769 (emphasis added).

It is clear from the above language that Congress was concerned with a measure which dealt only with the development of water power. Steam power was a known entity, but was viewed by the legislators as a factor to consider in devising a comprehensive plan for water power regulations not as a suitable subject for regulation under the Adamson bill.

It is against this background that Congressman Stevens of New Hampshire offered an amendment to H.R. 16053 which would strike out Section 14 and insert the following:

> "That the Secretary of War be, and he is hereby, authorized to enter into leases *for the use of surplus water and water power generated at dams and works constructed wholly or in part by the United States in the interest of navigation,* at such rates or such terms and conditions and for such periods of time, not to exceed 50 years, and with such provision for the periodical readjustment of rentals as may seem to him just, equitable, and expedient, subject, however, to the provisions of this act governing the authorization, maintenance, and operation of power plants, and to all regulations governing the use and disposition of the power, so far as the same may be applicable. And all such leases, the parties thereto and the terms and conditions thereof, shall be reported annually to Congress: *Provided,* That said Secretary of War in making such leases shall give preference to any municipal corporation or other public corporation not operated for private profit." *Id.* at 13256 (emphasis added).

Although the Stevens amendment changed the surplus water clause to language which closely resembled that adopted in the Federal Water Power Act of 1920, it was not intended to affect the scope of the surplus

water clause. The purpose of the amendment was to give an express preference to municipalities over private corporations in the procurement of leases and to make a strict provision for a license term of fifty years. See generally *id.* at 13256-60. The debate surrounding the Stevens amendment shows that the House did not propose to reach non-hydro-power uses with the "use of surplus water" language. Congressman Stevens of New Hampshire explained his proposed amendment thus:

> "[T]he only substantial change made in section 14 by the amendment which I have offered is that no *lease of water-power rights* to anyone shall be for a longer period than 50 years.
>
> ". . . no *lease of water-power* rights which belong to the Government should be given in perpetuity to any corporation, private or public." 51 CONG. REC. at 13257 (emphasis supplied).

Congressman Adamson, the sponsor of H.R. 16053, reacted thus to the Stevens amendment:

> "[I]f the committee [referring to the House] thinks that it is more likely to serve the purpose intended, it is all right with me. I can not see any difference." *Id.* at 13256.

Congressman Falconer, in speaking to the Stevens amendment, concerned himself with "hydroelectric matters" and "hydroelectric power." *Id.* at 13258. Finally, Congressmen Stevens of Minnesota, who claimed responsibility for the original Section 14, opposed the proposed amendment. Congressman Stevens (Minn.) did not mention an expanded surplus water clause to cover non-hydro-power uses, but rather sought

"the best use of *this incidental power. . . .*" *Id.* at 13256 (emphasis added). Congressman Stevens (Minn.) further stated:

> "Now, the result would be that if the [Stevens] amendment . . . were adopted the municipalities situated upon navigable rivers would want to do two things: they would want to have the plans of the dams changed so that navigation would no longer be the primary consideration but that *water power would be the main consideration;* and, secondly, these municipalities would endeavor to have dams constructed not so much for navigation, or ostensibly for navigation, but *in reality for water power.*
>
> "The result would be that there would be an increasing demand for these improvements, which would cost the Treasury of the United States enormous sums of money . . . for the sake of helping favored municipalities get a *chance to buy water power from water power dams* cheaper than could be secured in any other way. . . ." *Id.* (emphasis added).

The above debate demonstrates that the House, in "the first of the bills leading to the enactment of the Federal Water Power Act," App. 106, n. 165, intended the phrase "use of surplus water" to cover only hydropower uses.

The Stevens substitute to Section 14 was agreed to by the House on August 4, 1914, 51 CONG. REC. 13260 (1914), the date the Adamson bill was approved. *Id.* at 13276. The bill was sent to the Senate, whereupon it was referred to the Committee on Commerce on August 5, 1914. *Id.* at 13296. The Senate Commerce Committee reported a substitute bill, S. 6413, with a recom-

mendation to strike out all after the enacting clause of H.R. 16053 and to insert the substitute bill. S. REP. No. 846, 63d Cong., 3d Sess. 1 (1914). Section 10 of the substituted bill reported by Senator Shields contained a surplus water clause:

> "The Secretary of War may lease to any applicant having the capacity of grantee as herein defined, whom has acquired and owns the right to use the water for power and other purposes under the laws of the State in which a dam is constructed by the United States, *the right to utilize the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant, and owned by the United States,* and on such terms as may be deemed by the Secretary of War for the best interests of the United States, and reasonable and fair to both parties, and in awarding such lease preference shall be given to the applicant whose plans are deemed by the Secretary of War to be the best adapted to conserve and utilize in the public interest the navigation and water resources of the region, and all such leases and the parties thereto and the terms and conditions thereof shall be reported annually to Congress. The charges and rents arising from such lease or leases are hereby reserved and appropriated as a special fund in the Treasury to be expended for the maintenance of said dam and the further improvement of the waterway in which the same may be situated under the direction of the Secretary of War." (Emphasis added.)

Although the phrase "utilize the surplus water" may be interpreted broadly to include non-hydro-power uses, Senator Shields' report indicates clearly that the bill is intended to deal with "[t]he question of water power development by the construction of dams across

navigable streams and the improvement of navigation in connection with water-power development. . . ." S. REP. No. 846, *supra*, at 1. The report further states:

> "The committee has endeavored to carefully safeguard the interests of the public by vesting the right of absolute control and regulation of water-power development on navigable streams and its sale and distribution into the hands of proper public authority. . . . It is believed the bill is fair and just between the public and water-power development, and adequately protects the interests of the Government; that it properly conserves an exceedingly valuable asset that should be utilized; and at the same time offers sufficient inducement for it fullest development through private interests, municipal and public-utility corporations." *Id.* at 1-2.

Thus, the Commerce Committee proposed substitute to H.R. 16053 is another example of a broadly worded surplus water clause interpreted by its drafters to include merely the use of surplus water for water power purposes. With the exception of one day's debate, 52 CONG. REC. 4955 (1915), no further action was taken on H.R. 16053 in the Sixty-third Congress.

III. 1916 (64th Congress)

The concern of the 64th Congress with comprehensive water power legislation principally took the form of two bills, S. 3331, regulating the construction of dams across navigable waters, and H. R. 408, dealing with water power development on public lands. The House bill, also referred to as the Ferris bill, did not contain any provision concerning "surplus water" or "surplus water power." The Senate bill concerning

navigable waters, known as the Shields bill (*note:* S. 1419, 65th Congress, is also called the Shields bill), contained the following section as reported from committee:

> "Sec. 10. The Secretary of War may lease to any applicant having the capacity of grantee as herein defined, and having complied with the laws of the State in which a dam is constructed or to be constructed by the United States, *the right to utilize the surplus water power over and above that required for navigation at any navigation dam now or hereafter constructed,* either with or without contribution by the applicant, and owned by the United States . . . ." 53 CONG. REC. 2198 (1916) (emphasis added).

The term "surplus water" is not expressly included in S. 1419 but it is apparent from the debates that Section 10 was intended to incorporate surplus water. Senator Shields explained the provision in the following manner:

> "Under Section 10 . . . provision is made for payment of the excess of water arising from dams built solely by the Government . . . ." (*Note:* as well as from certain other dams) *id.* at 3064.

The Senate committee report contains the following summary of Section 10:

> "The bill also provides for the lease of water power in excess of that needed for operation and navigation facilities, incidentally produced by dams heretofore or which may be hereafter constructed by the United States in the improvement of navigable rivers . . . ." S. REP. No. 89, 64th Cong., 1st Sess. 4 (1916).

The report makes it apparent that Section 10 of the bill is limited to taking advantage of water power at government dams and does not extend to any other use of federal projects.

The Senate debates also contain an amendment by Senator Husting to Section 10 which would insert the following language pertaining to surplus water:

> "Sec. 10. That the said Secretaries be, and are hereby, authorized to enter into leases for the use of surplus water and water power generated at dams constructed wholly or in part by the United States in the interests of navigation . . . ." 53 CONG. REC. 3295 (1916).

This proposed section is identical to Section 14 of H.R. 16053 as passed by the House of the previous Congress except for the clause giving preference to municipal corporations.

Senator Husting, in explaining his amendment, indicates that the split of the term "surplus water power" into "surplus water and water power" is not intended to expand the licensing authority of the Secretary of War:

> "I think that by the adoption of this amendment leases for the use of surplus waters and water power generated at Government dams will be so regulated that the people will get such benefit as they are entitled to have from the sale of *power.*" *Id.* at 3296 (1916) (emphasis added).

He clearly refers to the leasing of surplus water as a sale of power generated at a federal dam. The quotation is ambiguous in that Senator Husting is not specific as to what kind of power can be sold. He does not expressly rule out the use of water for steam power

generation. But the fact that his amendment was identical to Section 14 of H. R. 16053, which was clearly limited to water power development would indicate that the context of his amendment was the same. There is no indication anywhere in the debates that the amendment was intended to extend beyond water power projects. If his intent was to expand the jurisdiction of the "surplus water power" clause beyond a water power project located at a federal dam, he does not indicate it. The thrust of his amendment was to provide for periodical readjustment of rentals and a limitation to 50 years on the length of a lease. It was rejected by the Senate.

Later in the Senate debates, Senator Husting offered an entire bill as a substitute to the Shields bill, which was also rejected. Section 27, which replaces the "surplus water power" section of S. 3331, further indicates that "surplus water" refers only to water power developments located at a federal dam:

> "Sec. 27. That the commission is hereby authorized in its discretion, to lease, for the *development of hydraulic and hydroelectric power*, any lands of the United States at the sites of dams and works constructed wholly or in part by the United States in the interests of navigation, together with the right to use surplus water disposable by the United States and not deemed by the commission from time to time necessary for navigation." *Id.* at 3668 (emphasis added).

S. 3331 passed the Senate with Section 10 virtually unchanged. However, the House Committee on Interstate and Foreign Commerce struck out the entire bill and substituted a new bill similar to the Adamson bill

of the 63d Congress. Section 19, relating to the use of government dams, reads in part as follows:

> "Sec. 19. That the Secretary of War be, and he is hereby, authorized to enter into leases for the use of surplus water and water power generated at dams and works constructed wholly or in part by the United States in the interests of navigation . . . ." H. R. REP. No. 404, 64th Cong., 1st Sess. 6 (1916).

The section is identical to Section 14 of H.R. 16053 as passed by the House in 1914. The House report explains that Section 19 is limited to the leasing of power created at federal dams:

> "Section 19 regulates the method to be pursued by the War Department in *leasing the power* at dams erected in whole or in part by the Government itself. It contains substantially the same provisions passed by the House two years ago and continues the method existing as to Government dams for many years, under which the War Department has satisfactorily regulated and leased surplus water at a number of such structures." *Id.* at 11 (emphasis added).

The language indicates that the purpose of the "surplus water" clause is to systematize a procedure which had been carried on in a piecemeal manner for many years. It does not indicate that the procedure is to be changed in regard to what may be licensed. It appears that the House intended the clause only to apply to such uses of surplus water as had been licensed in the past, *i.e.*, water power projects at federal dams.

Committee Chairman Adamson, in introducing the substitute bill on the floor, stated that Section 19 only applied to leases of power:

> "Secretary of War may lease out power for not to exceed 50 years on such terms as may seem to

> him best, but preference must be given, other things being equal, to bid solely for municipal use by municipal corporations." 53 CONG. REC. 10448 (1916).

House debate on Section 19 occurred on July 11, 1916. *Id.* at 10838-39. It was limited to discussion over the clause giving preference to municipal corporations. There was no indication that the section was intended to cover any use of surplus water other than for water power. Mr. Smith of Minnesota, who offered the amendment to the preference clause, stated the following in regard to the purpose of Section 19:

> "The section under consideration authorizes the Secretary of War to enter into leases for the use of power generated at dams constructed wholly or in part by the United States . . . ." *Id.* at 10838.

He sees no significance in the splitting of the term "surplus water power" into "surplus water and water power." To him, and apparently to the rest of Congress, they mean the same thing. Congressman Kent of California submitted to the Congressional Record a comparative analysis of the Shields bill (S. 3331) and the House substitute. He interpreted Section 10 of S. 3331 which uses the express language "surplus water power" but not "surplus water" in the following manner:

> "The Secretary of War may lease, on such terms as he may provide, the right to develop power from surplus water at dams owned by the United States and where the cost of construction is borne by the United States or jointly with lessee." *Id.* at 1559 (Appendix) (1916).

In discussing the House substitute, Mr. Kent stated the appropriate section:

> "Provides that Secretary of War is authorized to lease surplus water and water power generated at Government dams for not to exceed 50 years upon terms provided by the Secretary with periodical readjustment of rentals." *Id.*

Mr Kent makes no comment in his comparative analysis that the two sections are not intended to apply to the same activity—the utilization of government dams for water power. Furthermore, his use of the term "surplus water" in describing a clause that did not expressly use that term is further support for the argument that "surplus water" and "surplus water power" are essentially one and the same.

While Congress in 1916 directed its attention to comprehensive water power legislation, the surplus water clause appeared in a bill involving only the use of government dams. The bill, S. 3703 and H.R. 7560, was entitled:

> "A Bill [a]uthorizing the Secretary of War to grant permission for utilization of water power at locks and dams constructed by the Government on navigable rivers of the United States."

The use of the dam was expressly limited to water power:

> ". . . That the Secretary of War . . . may lease to any applicant . . . the right to develop power from the surplus water over and above that required for navigation at any navigable [*sic*] dam now or hereafter constructed . . . ."

These bills emphasize the fact that Congress considered the utilization of government dams for water power as

a separate problem from private water power development. But they also indicate that Congress was only interested in taking advantage of the water power at these dams and not of other uses. See H.R. 7997, 65th Cong., 2d Sess., a similar bill which indicates that this interpretation was valid at least through 1918.

IV. 1918 (65th Congress)

In 1918, the Senate passed S. 1419, also known as the Shields bill, regulating the construction of dams across navigable waters. The Senate Committtee report accompanying the bill makes it clear that the purposes of the bill relate only to navigation and water power:

> "The bill provides primarily for the improvement of navigation in rivers under the jurisdiction of Congress with private capital, as distinguished from appropriations by Congress for that purpose and, secondarily, for the development and utilization of the water power of those rivers resulting from such improvement, as well as that created by dams constructed and to be constructed under the authority of Congress." S. REP. No. 179, 65th Cong., 2d Sess. 1 (1917).

Section 10 of S. 1419 concerns the use of federal dams:

> "Sec. 10. The Secretary of War may lease to any applicant having the capacity of grantee as herein defined, and having complied with the laws of the State in which a dam is constructed or to be constructed by the United States, the right to utilize the surplus water power over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant, and owned by the United States . . . ." 55 CONG. REC. 227 (1917).

The wording of the section is identical to the wording of Section 10 of S. 3331 of the 64th Congress, indicating the Senate's intent concerning the use of federal dams had not changed.

The Senate report contains the following summary of Section 10:

> "The bill also provides for the lease of water power in excess of that needed for operation and navigation facilities, incidentally produced by dams heretofore or which may be hereafter constructed by the United States in the improvement of navigable rivers . . . ." S. REP. No. 179 at 4.

This summary is identical to a summary contained in S. REP. No. 89, 64th Cong., 1st Sess. 4 (1916), concerning Section 10 of S. 3331. This adds further support to the statement that the position of the Senate concerning comprehensive water power development had not changed substantially in almost two years.

The bill was sent to the House and referred to the Committee on Water Power. The committee had been created by the House on January 11, 1918, pursuant to H.R. RES. 220, 56 CONG. REC. 844 (1918). The creation of such a committee was in response to a Wilson administration proposed substitute bill, authored primarily by O. C. Merrill, a Department of Agriculture engineer. The bill contained several major changes from previous attempts at legislation. As amended by the 65th and 66th Congresses, it became the Federal Water Power Act of 1920. The House substitute marked the first time that a comprehensive water power bill was extended to cover both navigable waters and public lands. The administration bill as proposed could not have been referred to any single House committee. *Id.* at 850. The new committee was formed to consider the

administration bill. It was composed of the six ranking members from the House Committee on Interstate and Foreign Commerce, Committee on Public Lands, and Committee on Agriculture. *Id.* at 903. Congressman Thetus Sims of Tennessee was named chairman. The other members were: Anderson, Candler (Miss.), Doremus, Esch, Ferris, Hamilton (Mich.), Haugen, Hayden, LaFollette, Lee (Ga.), Lenroot, Lever, McLaughlin (Mich.), Parker (N.J.), Raker, Stephens (Nebr.) and Taylor (Colo.). *Id.* Later, Congressman Sinnott was named to replace Mr. Lenroot when he resigned to take a Senate seat. *Id.* at 5704.

This bill called for the creation of a commission composed of the Secretaries of War, Interior, and Agriculture. In Section 4(d) of the original House substitute, the Commission was authorized and empowered:

> "To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation, State or municipality, for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power across, along, or in any of the navigable waters of the United States or upon any part of the public lands and reservations of the United States (including the Territories), *or for the purpose of utilizing the surplus water or water power over and above that required for navigation at any navigation dam now or hereafter constructed, either with or without contribution by the applicant, and owned by the United States,* which licenses shall be irrevocable, except as herein provided. . . ." H.R. REP. No.

715, 65th Cong., 2d Sess. 23 (1918) (emphasis added).

This was the language of the bill as it was introduced in the committee deliberations. There are three features worth noting. First, the authority to lease surplus water had previously always been the subject of a separate section. In this bill, it is combined with the authority to license project works in Section 4(d). (*Note:* In the present law, Section 4(d) is renumbered as Section 4(e).)

Second, the conjunction "or" is used between the terms "surplus water" and "water power" instead of "and" as in previous bills. It is not clear why this change was made but there is no historical authority for concluding that the alteration of language indicates the intent of Congress to expand its authority over uses of "surplus water."

Third, the language of the "surplus water" clause indicates that the definition had not been changed since the early bills. Surplus water is still computed by deducting that amount of water needed for navigation from the total quantity of water. The construction of the clause "over and above that required for navigation at any navigation dam" may imply that the measurement is to be made at the dam site. At the very least, it indicates that the water power project is to be located at the dam site.

The bill as reported by the Committee on Water Power to the House floor contained three amendments relating to the "surplus water" clause. First, the clause itself, Section 4(d) was amended to read:

> ". . . or for the purpose of utilizing the surplus water or water power from any navigation dam . . . ." *Id.* at 3.

The word "at" was changed to "from" and the phrases "over and above that required for navigation" and "now or hereafter constructed either with or without contribution by the applicant, and owned by the United States" were struck from the clause. However, this deletion does not indicate that the definition of surplus water had been changed. The second amendment involving "surplus water" was the addition of the definition of "navigation dam."

> "'Navigation dam' means a dam or other work, constructed or owned by the United States for the improvement of navigation, with or without contribution from others, *from which flows surplus water not needed for navigation that may be disposed of under the provisions of this Act.*" *Id.* at 2 (emphasis added).

The Committee simply shifted the language to a different section of the bill.

The third amendment was the addition of language in Section 10(e) concerning charges for the use of navigation dams:

> "(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission. When licenses are issued that contemplate the use of navigation dams or other structures owned by the United States, in the discretion of the commission the charges to be paid by the licensee may be readjusted at periods of not less than ten years, in a manner to be described in each license: Provided, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is used by such State or municipality for State or municipal purposes; and that licenses for the development, transmission, or distribution

> of power for domestic, mining, or irrigation use in projects of not more than fifty horsepower capacity, may be issued without charge; *but in no case shall a license be issued free of charge for the development and utilization of power created by any navigation dam and that the amount charged therefor in any license shall be as nearly as possible that ascertained by the commission to be the value of such power.*" *Id.* at 7 (emphasis added).

Section 10(e) contains the criteria for all charges made by the Commission, whether under the "project works" clause or the "surplus water" clause. It states that charges for the use of navigation dams are to be based on the value of power created. The implication is that the "surplus water" clause involves only the licensing of a different type of water power project than the "project works" clause, but it is still limited to water power. (*Note*: See debates on charges implying that they should be the same for both clauses on pp. 48-49.)

The Committee on Water Power held extensive hearings on the substitute bill in 1918 and the almost 900 pages of testimony help to explain these amendments as well as adding further support for the argument that the Federal Water Power Act was limited to water power.

Perhaps the strongest support comes from O.C. Merrill, the principal draftsman of the FWPA. In response to questioning by Congressman Raker concerning non-power uses of water, Mr. Merrill stated:

> "Mr. MERRILL . . . . This bill is concerned only, in such instances, in the development of power. When that is done the licensee may make any other use that is available.

"Mr. RAKER. But the bill simply gives him a license for power purposes?
"Mr. MERRILL. Yes."
Hearings on S. 1419 Before the House Committee on Water Power, 65th Cong., 2d Sess. 89 (1918).

Congressman Raker, from the State of California, was concerned about the fact that the bill lacks any provision for the development of irrigation:

"Mr. RAKER. Are you so sure that there ought not to be a provision in here so that arrangements could be made to handle that?
"Mr. MERRILL. I do not think it is necessary at all. I do not see how there can be any question about it whatever. *The only thing this bill is doing is to grant a license for that particular power development occupying the public lands.* There is no assumption of any control whatever over any other uses the licensee may make of that water outside of that development.
"Mr. LAFOLLETTE. Have we any jurisdiction over that water?
"Mr. MERRILL. I do not think so."
Id. at 89-90 (emphasis added).

In the same discussion, Congressman Taylor gave his view of the scope of the act:

"This is a power bill and grants rights for power. Now if a party appropiates water under the State law, or if one of those companies makes an appropriation of water by a reservoir or otherwise for irrigation, under the State law they will have that additional property right in addition to the power privilege granted here; but this bill is for the purpose, as I understand it, of giving authority to create power and utilize water for power purposes." *Id.* at 92.

A later exchange between Rep. Taylor of Colorado (a member of the Water Power Committee, later chair-

man of the Appropriations Committee) and Calvert Townley, assistant to the president of the Westinghouse Electric and Manufacturing Co., clearly indicates that the steam plants were to be excluded from the bill:

> "Mr. TAYLOR. You have spoken about the handicaps that are against water power development as compared with steam. The steam plants are not subjected—or will not be subjected, generally speaking—to the governmental regulations that this bill provides for will they?
> "Mr. TOWNLEY. No, sir.
> "Mr. TAYLOR. And they will not be subjected either to the payment of Federal royalties?
> "Mr. TOWNLEY. No, sir." *Id.* at 179.

The testimony of F. C. Stevens of the Itasca Paper Company indicates that the substitution of "from" for "at" was not intended to expand the definition of surplus water, but instead related to setting a fee for the use of surplus water. Up to this point, it has been argued that the definition of surplus water was that quantity of water not required for navigation measured at the dam site. This definition made sense as long as the leases for surplus water were restricted to those situations where there was the possibility of navigation at the dam site. This had been the situation in all previous leases for surplus water. They had generally been made for those dams previously constructed by the government at which locks were in operation. Mr. Stevens testified that if a government dam were built at the headwaters of a stream where navigation was impossible, all the water passing over the dam would be considered surplus water because none

of it was required for navigation. This fact had ramifications to the setting of a charge:

> "[I]f the bill be construed as providing as the measure of compensation the surplus water or water power above that required for navigation *at the dam*, you realize it might be construed as requiring a payment for all of the water flowing over the dam, because none of it is required for local navigation." *Id.* at 395.

Mr. Stevens said that the situation could be clarified by changing the word "at" to "from" or "generated from" or "created from." Such a change would indicate that:

> "The measure of compensation shall not be for surplus water for navigation at the dam, but the surplus water that is not needed for navigation elsewhere . . . ." *Id.* at 395.

In the context of the hearings, the amendment was not intended to expand the definition of "surplus water" to include downstream uses of water but instead to allow the amount of water needed for downstream navigation to be taken into account in determining what quantity of water at the dam would be surplus. The clause still only applies to water power projects located at the federal dam.

The House debates serve to highlight the concerns behind the movement for comprehensive water power legislation. Surrounding the debates was a strong feeling that the nation's potential water powers were going to waste. For the eight years following the 1910 amendment of the General Dam Act of June 21, 1906, all water power projects had to individually be approved by Congress, and even then the permits were revocable at will. Congressman Snell gave the follow-

ing statement on the state of the development of water power in 1918:

> "Instead of 'An act to regulate power development', [the 1910 act] should have been called 'An act to prohibit power development.' As proof of this statement I have only to call your attention to the fact that with but two small exceptions no power developments and river improvements have been made by private capital upon navigable streams since 1912. . . ." 56 CONG. REC. 9118 (1918).

This sense of wasting a resource by not using it was heightened by the fact that huge quantities of coal and oil were being consumed that would otherwise have been conserved if water power was more widely developed. Congressman La Follette emphasized this point:

> "We are burning up millions of tons of coal and other millions of gallons of oil for fuel and power purposes that could have in a large part been conserved had we only made use of the millions of horsepower energy that could have been developed from our waterfalls and rapids, which once developed are there practically in perpetuity, and thus made our coal and oil supply last many decades longer for purposes not suitable for handling by hydroelectric energy." *Id.* at 9112.

In line with this emphasis on conservation the House realized that many water power sites would not be available for private development because federal navigation projects were already located or were to be located at such locations. Use of those dams for water power development faced the same pitfalls as private dams, as Congress had to grant authority to the Secretary of War to lease the surplus water for each individual project. Thus there was a large quantity of

potential water power that was currently unavailable for development. Congressman Sims summarized the situation as follows:

> "It takes time, and it takes a long time, to build a tremendous dam. A water-power dam in some places, on some watercourses, is estimated to cost as high as $25,000,000. But there are a number of Government dams, navigation dams, dams that have been built on navigable rivers for the purpose of improving navigation, that are now unavailable simply because there is no law that permits their utilization. *Those dams, or the water power produced by Government navigation dams*, can be made available immediately. . . . " *Id.* at 8929 (emphasis added).

Another factor adding to the feeling of urgency in the House was the influence of World War I and the realization that the country's power needs had expanded enormously.

These were the main concerns behind water power legislation in 1918. In light of these considerations, it is apparent that the primary purpose of the "surplus water" clause was to maximize the amount of water power that would be available to the country. In order to have a comprehensive bill, some provision had to be made for using the power incidentally created by the federal government in the course of improving navigation. Interest in irrigation and other uses of the water were secondary after the major concerns of navigation and water power. In deciding whether to grant a license for a water power project, the FPC, by Section 10(a), was to make sure the project took into consideration these secondary uses. But these considerations arose only in the context of deciding between two applications for a private project or deciding whether to

license at all. Before allowing a stream to be dammed, the FPC wanted to make sure that the project would be the best one for that particular location in terms of navigation, water power, irrigation, flood control, and other concerns. But in the situation where the dam had already been built or was to be built by the government, the considerations of Section 10(a) would not be applicable. The size and location of the project would already be determined. The lessee of the use of the dam would have no opportunity to alter the existing project so as to increase the water available for a secondary use such as irrigation. The House debates further indicate the secondary role of Section 10(a). Congressman Mondell, expressing his concern that FPC would construe the bill as granting jurisdiction over the question of the diversion of water for irrigation, reminded his colleagues that "[t]his is a power bill." *Id.* at 9114-15. Mr. Mondell further remarked that the bill as originally drawn was "confined to the use of water for purposes of power." *Id.* at 9115. The House demonstrated this narrow view of FPC authority by accepting Congressman Taylor's amendment to Section 10 (a) which deleted the word "irrigation." *Id.* at 9901-03. Speaking in support of his proposed amendment, Mr. Taylor stated:

> "This is a water-power bill. The purpose of this legislation is to regulate the water power of the entire United States, both upon the navigable and nonnavigable streams. It is purely a water-power measure and we have no right in this bill to include and interfere with other subjects that are not necessarily involved in water-power control." *Id.* at 9901.

Congressman Little, noting that licenses for the use of navigation dams were subject to readjustment every 10

years (*Note:* This provision was changed in the conference report to an initial 20-year term and then readjustment every 10 years. 57 CONG. REC. 4632 (1916).), offered an amendment, extending this provision to cover all licenses:

> "This provision they have in the bill is so just and wise that it occurred to me that it ought to be extended to cover everything in contemplation in the bill. If it is good for navigation dams, it is good for all other licensees. If it is necessary for the navigation licensees, it must be necessary for others . . . . I do not think it would be fair, because the licensee of a navigation dam might be called on after the first 10 years to raise and raise his payments, and there might possibly be a rivalry between them, and therefore the other licenses ought to be adjusted every 10 years. . . . It will put all the licenses upon the same basis as this navigation-dam license that the bill provides for. It will put all of the licensees on an equality. If you do not insert this amendment one man, 50 years from now, may be rolling in millions while another fellow in the same business a few miles away may be making only a reasonable amount of money." 56 CONG. REC. 9912 (1918).

Mr. Little indicates that licenses for the use of government dams will be for the same business as licenses under the "project works" clause—water power development.

The implication is that the "surplus water" clause, while obviously licensing a different dam (public v. private) than under the "project works" clause, is still limited to licensing for the development of water power.

The amendment was rejected, but not because the House disagreed with his equating of the licensing of

private projects and projects at government dams. The amendment was rejected because of the creation of uncertainty as to the amount of the charges thus tending to discourage investment in private projects. Congressman Small explained the problem as follows:

> "The difference between navigation dams and a private dam is this: A navigation dam has already been constructed by the United States, so that the licensee of a Government dam is not subjected to the large expense involved in the construction of a private dam. The dam is intended primarily for navigation purposes and incidentally for water power. The gentleman will understand that one of the difficulties in the development of water power by the issuing of licenses for the construction of private dams lies in the difficulty of inducing capital to make investment in these water-power plants. If the price to be paid is to be adjusted every 10 years, would the gentleman invest his money, stock, or bonds in a water power plant? . . . The present law, which was reported by the Committee on Rivers and Harbors, requires that all Government dams which in this bill are called navigation dams shall be constructed with sloughs and all the other particular appliances of a dam useful for water power, so that when the licensee takes possession of it he has a complete dam fitted for navigation, and also fitted to be immediately *applied to the development of water power*. That great expense has been borne already." *Id.* at 9913 (emphasis added).

Mr. Small does not take issue with Mr. Little's view that the private water power developer and the licensee of a government dam are in the same business and may be in direct competition. In fact, he tends to ratify that view by referring to the navigation dam as being outfitted for water power development.

The substitute bill was passed by the House and referred to a conference committee. The conference report proposed no changes from the House substitute in the wording of Section 4(d) except for the substitution of the word "Government" for "navigation." This substitution was made throughout the bill. The committee explained the change as follows:

> "It is thought that 'Government dam' is a more comprehensive and clearer expression of what is intended than the expression 'navigation dam.' In the definition of the term 'Government dam' the words 'the improvement of navigation' are stricken out and the words 'Government purposes' are inserted. In the opinion of the conference committee this is a proper change, as it is thought to be more comprehensive." 57 CONG. REC. 4635 (1919).

The definition of "Government dam" in Section 3 then read as follows:

> " 'Government dam' means a dam or other work constructed or owned by the United States for Government purposes, with or without contribution from others, from which flows surplus water not needed for Government purposes that may be disposed of under the provisions of this act." *Id.* at 4630.

The change was a reasonable one. Until 1918, bills containing the "surplus water" clause had all been limited to the construction of dams across navigable rivers. The only federal dams affected by that legislation would have been dams built for the improvement of navigation. But by combining the navigable waters bills and the public lands bill in the House substitute, the "surplus water" clause could then extend to federal dams built on public lands across non-navigable

streams for purposes such as irrigation or flood control. The switch in language was simply a recognition of this fact.

V. 1919-20 (66th Congress)

A bill which substantially corresponded to the House substitute bill considered in the previous session, as amended in conference (H.R. 3184), was introduced in the House of Representatives. No hearings were held on H.R. 3184, since Congress merely continued the unfinished business of the Sixty-fifth Congress. See H.R. REP. No. 61, 66th Cong., 1st Sess. (1919). The only significant amendment concerning surplus water was proposed by the Senate Commerce Committee, which recommended that the clause "from which flows surplus water not needed for Government purposes that may be disposed of under the provisions of this act" be deleted from the definition of "Government dam" in Section 3. The Senate agreed to the amendment without debate. 59 CONG. REC. 1105 (1920). The Conference Committee endorsed the amendment, since it "strikes out certain words not necessary to the definition of 'Government dam'." Statement of House Conferees accompanying Conference Report on H. R. 3184, *id.* at 6383. It is clear the deletion does not imply any change in the definition of surplus water.

Congressional debate on the 1920 Act, although quite extensive, provides no clear evidence on the scope of the surplus water clause, *per se*. This is not surprising if it is remembered that the Act was the culmination of many years effort on the part of Congress. The significant provisions of the bill were generally well-known and understood by the legislators. Debate centered on

the numerous points of contention between the conservationists on the one hand, and the representatives of the water-power interests on the other. It is submitted that the intended scope of the surplus water clause as reaching only hydro-power uses was not questioned by the legislators and therefore was not the subject of debate. Had any congressman viewed the clause as embracing the licensing of steam plants, it is inconceivable that the clause would have encountered no resistance by the power interests, or would not have been applauded by the conservationists.

An amendment proposed by Senator Wadsworth to Section 4(e) may, however, be relevant in determining the intent of Congress in changing the word "at" to "from," causing the surplus water clause to read: "[F]or the purpose of utilizing the surplus water or water power *from* any Government dam. . . ." 16 U.S.C. § 797(e) (1970) (emphasis added). The Wadsworth amendment provided that the word "from" be inserted following the word "along" in Section 4(e), so as to read: "To issue licenses . . . for the purpose of constructing, operating, and maintaining . . . project works necessary or convenient for the . . . utilization of power across, along, *from* or in any of the navigable waters. . . ." 59 CONG. REC. 1482 (1920) (emphasis added). Senator Wadsworth stated that the purpose of his amendment was "obvious" since "it would seem that the word 'from' should be added, so that in the event of diversion of water to a distance from the stream, which could not be called 'along' the stream, the case would be covered." *Id.* It is therefore arguable that Congress, by replacing the word "at" with "from," did not intend to reach plants downstream from the govern-

ment dam. In light of the summary agreement to the Wadsworth amendment, it may be contended that Congress intended by its use of the word "from" in the surplus water clause, to reach plants which diverted water stored at a government dam to a distance inland from the site, rather than plants which were located downstream from the dam.

The congressional debate on the 1920 Act does, however, show that the Act was viewed by the legislators as regulating only water-power development. Congressman Bankhead hailed the bill, H.R. 3184, as a means of placing "the great latent, potential water powers of this country . . . into practical business operation for the benefit of the people and of the industries of the country. . . ." 58 CONG. REC. 2025 (1919). Congressman Anderson observed that the House was "undertaking here to pass a general bill covering water powers in navigable streams and on public lands and in the forests. . . ." *Id.* at 2133. Finally, Congressman Esch, floor manager of H.R. 3184, in the House, stated that "[t]here are many provisions in this bill giving the [federal power] commission power to grant licenses to such applicants as will best develop the water powers of the region. . . ." *Id.* at 2035.

The notion that H.R. 3184 was intended by Congress to regulate only the development of water power is reinforced by consideration of the House deliberations on several sections of the bill. House consideration of Section 4(d) of H.R. 3184 (Section 4(d) corresponds to what is now Section 4(e) of Part I of the Federal Power Act), the section which is argued to provide the FPC with jurisdiction to license steam plants, demonstrates a concern with only the issues related to water

power development. Congressman White, concerned over FPC authority granted in Section 4(d), inquired of Congressman Esch "whether [the commission] would have authority to authorize the construction of a dam which would throw out some existing and going structure up the stream?" *Id.* at 2035. Mr. Esch replied:

> "There are many provisions in this bill giving the commission power to grant licenses to such applicants as will best develop the water powers of the region, and with such power granted to the commission it might be that they would grant a license to a lower builder of a dam, even though it might entail loss to the upper owner of a dam. Of course it would be subject to the payment of damages. I doubt, however, whether the commission would exercise such power to any considerable extent." *Id.*

Later in the debate, Congressman Small offered an amendment to Section 4(d) which would delete the exception of government dams constructed prior to passage in the proviso:

> "That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to the passage of this act." *Id.* at 2036.

Congressman Small was concerned with "a number of Government dams which have heretofore been con-

structed and which are not now being utilized for water power for lack of general legislation." *Id.* Congressman Anderson opposed the Small proposal, arguing:

> "In the case of the dams to be constructed in the future, the question which this particular section raises comes up at the inception of the application for the improvement. Consequently there is no particular harm done to anybody by providing that in that case there should be a period of two years elapse in order that Congress may have an opportunity to determine what it will do with respect to that dam. But in the case of a dam already constructed, the amendment of the gentleman from North Carolina simply means that there must be a delay of two years before anything can be done under the bill with respect to the power created by the Government dam, although the dam is entirely completed and ready for the installation of the power machinery. I can see no reason on earth why, under the circumstances created under this bill, where the commission has full authority over the rate charges and everything else connected with the dam, that there should be a delay of two years before you can utilize the power created by the dams already constructed." *Id.* at 2037.

Congressman Esch agreed with Mr. Anderson, noting that "[t]here are very few Government dams on which it is possible to develop power." *Id.* The Small proposal was rejected. *Id.* The House debate on Section 4(d) contains no reference to steam-power plants and, in fact, demonstrates a congressional concern only for the problems incidental to hydro-power developments.

As reported to the House floor, Section 7 applied in general terms to the "issuing [of] preliminary permits hereunder or licenses where no preliminary permits

have been issued. . . ." *See id.* at 2037. The second paragraph of Section 7 provided as follows:

> "That whenever, in the judgment of the commission, the development of any project should be undertaken by the United States itself, the commission shall not approve any application for such project by any citizen, association, corporation, State, or municipality, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the project as it may deem necessary, and shall submit its findings to Congress with such recommendations as it may deem appropriate concerning the construction of such project or completion of any project upon any Government dam by the United States." *Id.*

An amendment was offered by Congressman Small to strike out this paragraph. *Id.* at 2038. Debate on the proposed amendment demonstrates that this generally worded section was interpreted by the congressmen as anticipating only Federal Power Commission jurisdiction to regulate water power development. Thus Congressman Small inquires of Congressman Esch:

> "As I interpret [the second paragraph in section 7] it reposes with the commission the right to express their judgment as to whether the development of water power upon a certain stream should be undertaken by the United States rather than issuing license to a person, corporation, and so forth?
>
> "Mr. ESCH. Yes.
>
> "Mr. SMALL. If it is their judgment that the development of water power should be undertaken by the United States, that they shall not issue a license but report to Congress?
>
> "Mr. ESCH. Yes." *Id.* at 2038.

Congressman Small then argues:

> "[I]f this body is in favor of the development of water power by the United States, or even if it is a debatable question in the committee, let the paragraph stay in; but I understand the contrary is true, and that this bill was predicated upon the theory that it would invite private capital, through the agencies of individuals and corporations and municipalities and other State agencies, to develop water power, and that it is expected that capital will respond to this invitation, and that water power will be developed. If that be true, why should Congress repose in three men the right to hold up the license for water power, all other conditions being favorable for the issuing of a license, because, forsooth, in their opinion the United States ought itself to develop the water power?" *Id.*

Mr. Small's rhetorical question was answered by Congressman Sims:

> "[T]he commission is not authorized to expend money in development. The commission may, however, when an application is made to it for a license to build a navigation project or to build a water power upon Government-owned land, if it deems it in the public interest that the Government as far as it will for the cost increase, withhold the license and recommend to Congress that the Government make the improvement." *Id.*

Following the rejection of Congressman Small's proposed amendment to the second paragraph of Section 7, *id.* at 2039, Congressman McLaughlin of Michigan offered an amendment to the first paragraph of Section 7. The first paragraph of the section provided:

> "That in issuing preliminary permits hereunder or licenses where no preliminary permit has been

> issued the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plants of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region." *Id.* at 2037.

Congressman McLaughlin's amendment proposed to limit the preference given states and municipalities to the case where "such power is to be used by such States or municipalities for State or municipal purposes." *Id.* at 2039. Mr. McLaughlin believed:

> "... that states and municipalities should have the authority and should be given the preference to develop water power for their own use, but I do not believe that they should be permitted to develop water power for the purpose of going into the business of selling power, to engage in commercial propositions." *Id.*

Mr. McLaughlin further stated the purpose of his amendment was:

> "... to limit States and municipalities, in the development of water power, to do so for their own uses, and that they shall not develop water power primarily for the purpose of engaging in the business of making and distributing power." *Id.*

Congressman Sims opposed the amendment, arguing:

> "The ... amendment would prevent a city or town from applying for a license and developing

> water power unless the city at the time it applied for it had need, for purely municipal purposes, for the whole amount of power to be developed." *Id.*

The amendment was rejected. *Id.* at 2040.

Section 10(e) of H.R. 3184 extended authority to the FPC to fix reasonable annual charges to be paid by all licensees. House debate on this section shows that a "licensee" was contemplated to be a water-power developer. Congressman Haugen offered an amendment to Section 10(e) which proposed to delete the language granting the FPC authority to fix these charges. *Id.* at 2136. Mr. Haugen's purpose was to insure that "consumers of the power will pay less for the use of the water power than they would under the plan suggested." *Id.* The amendment was rejected, *id.* at 2136. Congressman Little then offered an amendment to Section 10(e) which proposed to permit a readjustment by the Federal Power Commission of charges to the power companies at the end of 20 years and subsequently at the end of periods not exceeding 10 years for "all" licenses issued by the Commission. See *id.* at 2221 (remarks of Congressmen Small and Little). This proposal sparked a heated debate. Congressman Small opposed the amendment, arguing:

> "The purpose of this entire bill is to attract capital for investment in water-power development upon such conditions that shall be just to the United States. Unless both purposes are met in this bill, there will be no result, and we will be confronted by the same conditions that have existed for a long period of years. No capital will be invited and there will be no investment in water power. Members understand very well that even now we have water-power legislation, legislation which it was

> contemplated at the time it was enacted would invite capital, but it has not done so, and no water power is being developed. This bill was drafted for two purposes—one to attract capital in the development of water power under such terms as might be just to the United States . . . ." *Id.*

Congressman Small further remarked that this:

> ". . . amendment applies to every license issued for the development of water power, reposes in the commission the discretion to require an adjustment at the end of 20 years and then an adjustment at every 10-year period thereafter. Bonds are to be issued by these companies. It takes great capital in the development of water power, and those bonds, it may be assumed, will run 20 years, 30 years, perhaps 40 years, and capital will not be invested in those bonds nor in the stock of the company which is seeking a license. In other words, capital will not be invested in development of water power if the license to be issued carries any such condition as that provided in the amendment . . . and one of the features intended to be accomplished by this bill will have failed if that amendment shall be adopted." *Id.* at 2222.

Congressman Ferris maintained that the Little proposal is within the Commission's power, as provided for in other clauses of the bill:

> "[T]his commission is clothed with full power, with full authority to insert in the contract, which is a binding contract between the water-power developer and the Government, any condition they may desire. . . .
>
> * * * * *
>
> "In the stage of water-power development as it is now, I think there will be many cases when the

> developer is entitled to know in the beginning, on any unconstructed water-power site, something of what is going to happen to him during the life of his franchise. He can not secure money to build it without some assurances as to what will happen clear through. The commission is given the very widest powers and they will safeguard the public and at the same time be reasonable so as to get development." *Id.*

Congressman McArthur spoke against the Little proposal and explained the adverse effect he felt the amendment would have on hydroelectric developers:

> "[I]n the development of hydroelectric power two elements are essential. First, we must have the power to develop; and second, we must have the money with which to develop it. We have in this country untold millions of hydroelectric power now going to waste, and it is a burning shame that Congress has not already passed legislation to permit the development of this power for commercial and other purposes.
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> * * * * *
>
> "[T]he developers of hydroelectric energy, when they have water-power developments in view, must go on the market and compete with other business propositions in the effort to secure credit and capital. And they are not going to be able to go into the market and get their money unless they have something to show from which a reasonable re-something to show from which a reasonable return may be expected.
>
> * * * * *
>
> "I hope all of these amendments that are put on here with a view to restricting development and making it harder to raise money to develop hydroelectric energy will be voted down and that the

> committee will be sustained all through this bill, a bill almost identical to that which passed the House in the last Congress and got as far as conference in the Senate, where it was blocked." *Id.* at 2222-23.

The Little amendment was rejected by the House. *Id.* at 2223.

Amendments offered to certain other subsections of Section 10 support the view that the section, in its entirety, was intended to reach solely water power development. Congressman Mays, in offering an amendment which would provide that transmission lines constructed or operated under the act would be treated as common carriers, compared and contrasted the present bill with legislation dealing with coal.

> "In the legislation dealing with our coal resources a provision was carried that only one lease could be secured by any individual or corporation each holding a lease. . . . There is nothing in the bill, so far as I can observe, to prevent existing or future monopolies from securing all the *undeveloped power sites* yet remaining upon the public domain or along the navigable streams of the country. . . . Coal is carried on railroads acting as common carriers. It represents heat, light, and power. It may be burned at the mines and transmitted over the lines to the consumer in the form of electricity. *Water power* is heat, light, and power, minus the ashes and smoke. It serves the public in the same manner as coke and fuel oil. The railroads carrying coal, the pipe lines carrying oil, must operate as common carriers. Manifestly the same rule should apply to transmission lines doing interstate business." *Id.* at 2136-37 (emphasis added).

The Mays proposal was rejected. *Id.* at 2137. Congressman Briggs then offered an amendment which would attach a "penalty clause to section 10(h) by saying that holders shall forfeit all permits or licenses that they may have upon conviction of a violation of this provision against monopoly. . . . [and] that any such offender shall also be liable for any other penalties that may be provided by law." *Id.* at 2138 (remarks of Congressman Briggs). Mr. Briggs' amendment was grounded on the opinion that:

> "[N]o stronger penalty could be attached than a forfeiture of the license or permit held by the body seeking to create a monopoly of the water power. Through the instrumentality of licenses, which may run for 50 years, and of permits, by which they may hold preference rights or options for a term, even as long as three years, to acquire such licenses and privileges of water power, and through subsidiary corporations or by dummy persons some combinations of capital may accomplish a monopoly that never could be tolerated in this country. . . .
>
> "When the incalculable value of the water power of this country is considered, every precaution ought to be observed in order that this great asset of the people should not be appropriated by private interests for selfish ends. It is to be expected that resistance will be met in the effort to impose safeguards around anything so tremendously attractive and desirable to those seeking monopoly of the water power of the United States. . . .
>
> "It must not be forgotten that the amount of waterpower which can be utilized in this country is almost fabulous.
>
> ". . . [W]hile development of our great waterpower resources ought to be encouraged, so that

> their tremendous energy, which now runs to waste, can be harnessed and made to serve the needs of the people, it should not be done at a cost which might threaten to completely absorb the very holdings themselves." *Id.*

The Briggs proposal was rejected. *Id.* at 2139.

House debate on Section 12 of H.R. 3184 and the amendments proposed thereto provide another example of broad wording interpreted by the legislators as encompassing merely water-power facilities. Section 12, as reported to the House, provided:

> "That whatever application is filed for a project hereunder involving navigable waters of the United States, and the commission shall find upon investigation that the needs of navigation require the construction of a lock or locks or other navigation structures, and that such structures can not, consistent with a reasonable investment cost to the applicant, be provided in the manner specified in section 11, subsection (a) hereof, the commission may, before taking action upon such application, cause a report upon such project to be prepared, with estimates of cost of the power development and of the navigation structures, and shall submit such report to Congress with such recommendations as it deems appropriate concerning the participation of the United States in the cost of construction of such navigation structures." *Id.* at 2220.

Congressman Lankford offered an amendment which proposed to insert the following after the final word of the section:

> "Whenever it is made satisfactory to the commission that the needs of navigation can be provided for in a way profitable to the United States

> by the joint activity of the United States and a State or States, or municipality or municipalities, or other interested parties, and that an essential water power and a needed navigable waterway can be obtained by the performance of a contract whereby the United States makes certain improvements, provided the other interested contracting parties do the things obligated to be done, then the commission shall cause the necessary surveys to be made, the necessary data obtained, and the necessary estimates made to determine the things which can be profitably done by the United States and other contracting parties and may recommend to Congress that the United States obligate to make certain improvements in said scheme of water-power and waterway development, provided a satisfactory contract is entered into by the other contracting party to complete said development." *Id.*

In support of his proposed amendment, Mr. Lankford argued thus:

> "There are provisions in the bill for the United States to make improvements for the purpose of helping navigation and for the purpose of constructing better water power. There are provisions for municipalities to be authorized by the commission to make improvements, to develop water power, and to develop navigation. There are provisions for corporations to make these improvements. I have offered the proposed amendment, therefore, to permit the United States Government to act in connection with the States or with municipalities or with corporations in making the improvements necessary to construct better waterways and to develop better water power. . . . [A]n essential water power and a needed navigable waterway can be obtained by the performance of a contract whereby the United States makes certain improvements, provided the other inter-

> ested contracting parties do the things obligated to be done . . . ." *Id.*

Congressman Green opposed the bill, explaining:

> "The principal object of this bill is to make unnecessary for the Government to expend money in developing water power. I do not believe this Government ought at this time to enter into any further projects. . . . As for the Government helping the States to carry out this matter—to increase water power—I think we have done enough in that line." *Id.*

Finally, consideration of House debate on Section 17, which allocated fifty percent of certain "charges arising from licenses hereunder . . ." to special funds, provides further evidence that such a "license hereunder" pertains to hydro-power development. As reported to the House floor, Section 17 read:

> "That the charges arising from licenses hereunder shall be paid into the Treasury of the United States. Fifty per cent of the charges arising from licenses hereunder for the occupancy and use of national forests is hereby reserved and appropriated as a special fund in the Treasury to be expended under the direction of the Secretary of Agriculture in the survey, construction, and maintenance of roads and trails within such national forests. Fifty per cent of the charges arising from licenses hereunder for the occupancy and use of national parks is hereby reserved and appropriated as a special fund in the Treasury, to be expended under the direction of the Secretary of the Interior in the improvement and development of such parks. Fifty per cent of the charges arising from licenses hereunder for the occupancy and use of public lands, and of national monuments, and power site or other reserves outside of national

> forests shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the act of Congress approved June 17, 1902, known as the reclamation act. All proceeds from any Indian reservation shall be placed to the credit of the Indians of such reservation. Fifty per cent of the charges arising from all other licenses hereunder is hereby reserved and appropriated as a special fund in the Treasury to be expended under the direction of the Secretary of War in the maintenance and operation of dams and other navigation structures owned by the United States, or in the construction, maintenance, or operation of headwater or other improvements of navigable waters of the United States." *Id.* at 2226.

Debate centered on an amendment offered by Congressman Walsh which proposed to abolish these funds. Mr. Walsh felt that treasury receipts should be uncommitted, especially in light of his expectation that when:

> ". . . this bill becomes a law we will see enormous development of water power in this country and that it will revolutionize the hydroelectric power plants of the country and result in the payment into the Treasury of the United States of many hundreds of thousands of dollars." *Id.* at 2236.

Congressman Ferris opposed the Walsh proposal, arguing:

> "[S]ection 17 has to do with the receipts from royalties or rentals on the franchises herein granted. There are approximately 165,000,000 acres of forest reserves in the country. Many water power sites are on those forest reserves. They are to be developed under this bill. They are scattered throughout the 17 public land States of the West. This bill provides that 50 per cent

> of the receipts of this water power development shall go to the development of those forests, the construction of roads, the prevention of forest fires, and improvements generally. [Congressman Walsh] would take that away from them. . . .
>
> "Now, passing from that the next provision is that 50 per cent of the royalty or rentals is to be expended upon the national parks. There are some 30 or 40 national parks and monuments, the Nation's playgrounds, and every citizen of the Republic is interested in their beautification, their preservation, and development. This bill provides that 50 per cent of the proceeds of the water power developed in these 30 or 40 national parks shall be expended for the beautification of the Nation's playgrounds. Again, the gentleman, by his amendment, would strike them down; again he would denude them—strip them—throttle them—deny them. Mr. Chairman, there are about 335,000,000 acres of public lands in the United States, and about 370,000,000 acres in Alaska, 700,000,000 acres in all, and they have many water-power sites on them and this provides that 50 per cent of the water power or receipts of the water power developed on those public lands shall go to the development of the roads and schools in those sparsely settled States. [Congressman Walsh], with all of his earnestness and zeal, would take that away from the States." *Id.*

The Walsh proposal was rejected. *Id.* at 2237. See Senate debate on proposed amendments to Section 17 indicated that the phrase "charges arising from licenses hereunder" was interpreted to refer to "remuneration from those who use water power . . . ," 59 CONG. REC. 1475 (1920) (remarks of Senator Lenroot), and to "funds that are derived from water power . . . ," *id.* at 1477 (remarks of Senator Nelson). *See also* 58 CONG. REC. 2242-43 (1919), wherein the House debate on

Section 24 of H.R. 3184, which applies broadly to "any proposed project under the provisions of this act . . . ," indicates the view that the section countenanced merely "the water-power applicant." *Id.* at 2243 (remarks of Congressman Elston.)

Thus, House debate on H.R. 3184 demonstrates a congressional intent to deal merely with water-power development in the present bill. This is shown both by general remarks made by the members when discussing the nature of H.R. 3184, and by a consistent interpretation by House members of general provisions dealing with "licenses (or projects) hereunder" as referring to hydro-power facilities.

Senators apparently shared the view that, as passed by the House, H.R. 3184 dealt merely with the regulation of hydro-power. Thus, in giving a general introduction to the bill for his colleagues, Senator Jones referred to H.R. 3184 as the "water-power legislation." 59 CONG. REC. 241 (1919). In his rather lengthy speech advocating Senate passage of the bill, Senator Jones mentioned only the necessity of providing for hydro-power development. For example, he asserts that:

> "If 40 years ago, instead of enacting restrictive laws which have prohibited development of our water powers, Congress had invited their development through fair and reasonable terms, the beginning of the World War would have found the United States with 20,000,000 developed hydro-electric power [horsepower], instead of 5,000,000.
>
> " . . . Every undeveloped water power for which a market now exists represents a waste of an inexhaustible natural resource." *Id.*

* * * * *

"The necessity for the development of our water power is of paramount importance to the people of the United States, and Congress should enact a law without further delay the terms of which will make the investment of capital safe and not prevent a reasonable return.

"The bill now before the Senate is perhaps too restrictive in terms and requirements it imposes on the capital invested and upon the details of operation, but water-power men tell me they can work under it, and I trust that the Senate may pass the committee bill without in any way making its terms more onerous." *Id.* at 244.

The conclusion that Mr. Jones views the House-passed bill as pertaining to water-power development to the exclusion of energy developed by other power sources is supported by the following remarks:

"[In the State of Washington] coal is mined and steam-power plants are operated within the sound of descending waters, and trainloads of coal are imported each day from British Columbia.

* * * * *

"The utilization of even one-third of the enormous amount of energy latent but now wasting in our falling waters would make the United States the greatest manufacturing country of the world. The development of our water powers is intimately connected with the solution of such great national problems as the national defense; extension of inland waterways; shortage of food, conservation of coal, oil and labor; irrigation of arid lands; and railroad car shortage. In addition to conserving vast quantities of coal and labor to mine and handle it, the hydroelectric energy existing in our running waters will, when developed, be utilized in . . . manufacture. . . ." *Id.* at 241.

In his synopsis of the House-passed bill, Senator Jones delineated the powers conveyed to the Federal Power Commission, indicating jurisdiction merely over water-power development:

> "The bill creates a Federal water-power commission consisting of the Secretaries of War, Interior and Agriculture, to which is given authority over all matters over which the Federal Government has jurisdiction, pertaining to the development of water powers in navigable streams and the improvement of navigation incident thereto, over the development of water power in the public domain, and the development of water power in the national forests. Under the laws now in force the development of water powers contained in navigable streams is under the jurisdiction of the War Department, those in the public domain are under the Interior Department, and those in the national forests are under the Department of Agriculture. The establishment of this commission, according to those who strongly favor it, would promote unity of action, together with economy of operation, through segregating all authority in this board, whose members would bring to its aid the personnel and vast machinery of the three great governmental departments over which they preside." *Id.* at 244.

Senator Jones, in outlining the preferences given the federal and local governments mentioned only the development of hydro-power:

> "It will thus be seen that under the terms of the act the Federal Government has, through its commission, the first right to develop any of the water powers under its jurisdiction. Should the Federal Government elect not to do so, then States and municipalities are accorded a preference right to licenses on even terms over citizens, associations

> of citizens, or corporations organized under the laws of the United States or any of the States thereof. Neither the Federal Government, the States, nor municipalities would pay any charges in event of their developing water power, and the entire burden of sustaining the cost of administration of the act, in addition to payment for use of Government lands, would fall upon such citizens and private corporations as cared to enter the field of water-power development." *Id.* at 246.

Senator Jones bemoaned what he considered to be the excessive restriction on private hydro-power development, but indicated that the water-power industry was capable of operating under the bill:

> "The Government . . . is securing a tremendous bargain if it can induce the development of the water powers of the country under the terms of this bill. And, indeed, such restrictive terms as I have set forth, and which are contained in this act, do not constitute a very attractive proposition to enterprising men and to capital; but, as I said before, water-power men tell me they can work under it, and so I hope we may soon pass it." *Id.*

The introductory remarks of Senator Nelson further indicate that Congress viewed the FPC as a "water-power" commission:

> ". . . The pending bill provides for the establishment of a *water-power commission,* consisting of the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of War. . . . The *water-power commission* thus created is given authority to act within the scope of the bill." *Id.* at 1041 (emphasis added).

Mr. Nelson indicates that the provision for temporary permits in the bill applied merely to the construction

of "any dam or works for the development of water power." *Id.* Similarly, the licensing provision was seen as encompassing "water-power rights." Senator Nelson indirectly referred to the surplus water clause in what is presently Section 4(e) of the Act when he drew the following distinctions:

> "There are two classes of dams. Where a dam is constructed by the Federal Government for purposes of navigation, and *there is a surplus power to be disposed of that ought to be utilized, in that case the Federal Government having constructed the dam, and by the construction of it having created a water power, manifestly the Government is entitled to full compensation for the use of that power.* But where the Government has simply issued a license to a man, giving him permission to build a dam with his own money, his own capital, his own resources; in that case I have always believed, and that has been the view of the majority of the Senate, that the Government is not fairly and equitably entitled to any pay for the use of the water. If any compensation is to be made for the use of the water, it belongs to the States or to the riparian owners." *Id.* (emphasis added).

It is clear that Mr. Nelson contemplates only the use of surplus water to develop hydro-power.

The remarks of Senator Chamberlain provide further evidence that one prime motivation for the passage of H.R. 3184 was the need to develop hydroelectric power as a means of conserving a dwindling coal supply:

> "[W]ater-power legislation can not be considered a local or a sectional question. To encourage water-power development is a national duty. It concerns every citizen of the United States,

whether he dwells in the vicinity of a water power, in a city, or upon the plains of Iowa. . . .

* * * * *

"Coal shortage brings up again the folly of leaving unused the Nation's vast resources of water power. The more these are developed the less desperate will be the fuel stringency. The waste is not alone one of money. It extends in its final direct results to public health and life itself as these are affected by the inability to get coal for heating and for the production of the necessaries of life." *Id.* at 1223.

Senator Chamberlain estimated that 100 million tons of coal per year would be saved if the available water-power were developed. *Id.* Mr. Chamberlain is not, of course, asserting that coal conservation is provided for in the bill; he merely points out it will be a beneficial result of the development of hydro-power. Thus, he concludes:

"All the available water power should be developed and in the quickest time possible, in the interest of the economic uplift of the country, of its social regeneration, and of its wealth, and in order to permit it to secure its share of the markets of the world. Hydroelectric energy gives us the means of saving our coal, enables us to obtain electricity at a low price, to lower in many cases our industrial costs of production, and to empower our agriculture. It will become the surest weapon in the economic struggle which faces us." *Id.* at 1224.

An argument by Senator Lenroot in opposition to a proposed amendment which would require a new licensee to pay severance damages to a former licensee at least implicitly demonstrates that the licensing of steam plants are not within FPC authority. Senator

Lenroot maintained that a requirement to pay severance damages would cause a lease to, in effect, be perpetual. To illustrate, Senator Lenroot propounded the following hypothetical:

> ". . . If a licensee is enabled to produce water power for $10 per horsepower and steam cost him $20 per horsepower, and by reason of the expiration of his license a new licensee comes in and takes it over, the licensee will have to build a steam plant to supply that amount of power, which will cost him twice as much as the water power. . . ." *Id.* at 1473.

Senator Lenroot argued that in the above case the new licensee, in order to take over the property, would be required to pay the licensee $10 per horsepower for an indefinite time in the future. *Id.* Senator Lenroot's hypothetical is of interest because he assumed a licensee is one who is operating a water-power facility, and that a new license having been issued, the opportunity for the former licensee to produce hydro-power will no longer exist. Producing power in a steam plant is assumed to be available, perhaps because the FPC has no power to license its use, and therefore no authority to withhold permission for its operation.

General remarks made on the Senate floor at various points during the debate indicate that H.R. 3184 was designed to deal solely with the regulation of hydro-power. Senator Harrison described the bill as "water-power legislation" and states the purpose of H.R. 3184 thus:

"This bill was designed to develop water power from the navigable streams and on the public domain in the United States. It was to encourage water-power development." *Id.* at 1483. Similarly, Senator Nelson

refers to H.R. 3184 as the "water-power bill now pending," and to the FPC as the "water-power commission." *Id.* at 1493. He described the FPC as follows:

> "Under this bill there is created a great *water-power commission* consisting of the heads of three of the great departments of the Government—the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture. That commission is to pass on all *water-power questions* in the entire country. . . ." *Id.* at 1493 (emphasis added).

Mr. Nelson answered the conservationists who had maintained that the bill provided for too great an incentive to the hydro-power companies thus:

> "[I]t is idle, it is mere camouflage, to say that we are giving away millions and millions of dollars of water power to water-power companies. We are giving it away to the people of the States and to their representatives. . . .
>
> * * * * *
>
> "These great corporations are needed for the development of water power, and the obstacle to water-power development that has intervened now for 10 years has created a monopoly in this country by leaving it to those who own now-existing dams. By holding up legislation, by preventing legislation for water-power development for 10 years, those that were fortunate enough to have water powers before that time have had a monopoly of it, and they are anxious to continue the monopoly. . . ." *Id.*

Senate debate on two proposed amendments to Section 10(e) supports the conclusion that the Congress intended that "licensees" under the bill were to be only hydro-power developers. The first amendment was

proposed by the Senate Commerce Committee, and provided that Section 10(e), as passed by the House, be replaced with a provision which would prove less costly to the hydro-power corporations. The proposed amendment was to replace:

> "That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission. When licenses are issued that contemplate the use of Government dams or other structures owned by the United States, in the discretion of the commission, the charges to be paid by the licensee may be readjusted at the end of 20 years after the beginning of operations and at periods of not less than 10 years thereafter, in a manner to be described in each license." *Id.* at 1429,

with:

> "That the licensee shall pay for the license herein granted such reasonable annual charges as may be fixed by the commission for the purpose of reimbursing the United States for the cost of administration of the act in relation to water powers developed under its jurisdiction, in the proportion that the water power developed by the project covered by said license bears to the total water power developed by all projects licensed under the act, and for that purpose such charges may be readjusted from time to time, not oftener than once in two years; the licensee shall also pay for the use and occupation of any public lands and lands in reservations, except tribal lands embraced within Indian reservations, necessary for the development of the project covered by the license such reasonable annual charges based upon the actual value of the Government lands used as may be fixed by the commission, but in no event shall the annual charge for the foregoing exceed 25 cents per developed horsepower: *Provided,* That when licenses are issued involving the use of Govern-

> ment dams or other structures owned by the United States or tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of 20 years after the beginning of operations and at periods of not less than 10 years thereafter in a manner to be described in each license." *Id.*

The proposal sparked a heated debate. Senator Lenroot argued that the committee amendment constituted "a clear gift of hundreds of millions of dollars to the water-power corporations of the country, without any return to the public." *Id.* Senator Lenroot alluded to a hypothetical discussed earlier by him, wherein he illustrated a situation in which a savings to the water power company will not affect the rates charged to the consumer. The Senator assumed a city that utilizes 15,000 horsepower, 5,000 of which "is produced from a dam licensed *under this act*, . . . [and] the other 10,000 horsepower is produced by steam." *Id.* at 1101 (emphasis added). Senator Lenroot's point is that the Commission, in this situation, will permit a rate charged by the water-power utility which would enable the steam-power utility, with a higher cost of operations, to exist and pay a fair return. *Id.* Whether Senator Lenroot's thesis is correct, for the purposes of this case, is unimportant. It is important, however, that the senator appeared to view only the water-power plant to be licensed "under this act." The debate on Senator Lenroot's hypothetical did not question this assumption. *See id.* at 1430-31. It is abundantly clear from Senator Lenroot's argument that he views Section 10(e) as affecting only "water powers," and the "water-power utility." *See id.* at 1430. Senator Nelson supported the proposed amendment, arguing that "[i]t goes without

saying that all the burdens put upon water power in these cases will ultimately come out of the consumer in one form or another." *Id.* Senator Nelson categorized Senator Lenroot's hypothetical as "an extravagant and unreasonable case," and maintained:

> "Those cases are very few and far between. I desire to say that where *water power* is developed and electric power is thereby secured in the neighborhood, it is not likely that any steam plant will be started in competition with it, for it can not compete with it." *Id.* (emphasis added).

Senator Nelson's constant references to "water powers" and "water-power development" show the scope of Section 10(e) he intended. Finally, Senator Norris endorsed Senator Lenroot's argument stating that:

> ". . . this commission in that case [should] charge a rate for a license for the development of the power that comes from the water that will be sufficient to make up the difference; otherwise the company developing the water power would make all of the difference, and the people of the immediate vicinity would get no benefit whatever from it." *Id.* at 1431.

Throughout Senator Norris' speech references to "water power" and "the water-power people" were abundant. *See id.* Although the Commerce Committee proposal was rejected on January 12, 1920, *id.* at 1432, it was reoffered in the Senate on January 15, 1920, by Senator Nelson, who reminded his colleagues that it related "to the compensation for the use of water powers built by private capital and not by the Government." *Id.* at 1571. The amendment was agreed to. *Id.* at 1573.

Senate debate on an amendment offered by Senator Nugent which would provide that Section 10(e) allow the tribal council veto power over any license authorization "in case of tribal lands embraced within an Indian reservation, which said lands were ceded to the Indians by the United States by treaty." *Id.* at 1564. Senator Walsh, in support of his opposition to the Nugent proposal, included in the *Record* a portion of a letter received from the Secretary of the Interior, which read, in relevant part:

> "The *general water-power bill,* H.R. 3184, which has passed the House of Representatives and been favorably reported by the Senate Committee on Interstate Commerce, provided a general and comprehensive plan for the leasing and development of water-power sites upon public lands, Indian reservations, and navigable streams to be controlled by a commission composed of the Secretaries of War, Agriculture and Interior. The proceeds received from such developments on Indian reservations are, under that measure, to go to the benefit of the Indians concerned. That measure amply takes care of the matter of leasing and use of such sites in Indian reservations, and in my opinion this bill should go no further than to reserve the sites and should impose no restrictions of conditions upon the leasing thereof." *Id.* (emphasis added).

Senator Myers joined Senator Walsh in opposition to the amendment, arguing:

> "If this amendment become a law, it would be in the power of a tribe of Indians, arbitrarily and without any reason whatever, to block a *project for water power development . . . .*" *Id.* at 1565 (emphasis added).

Senator Nugent, in defending his proposed amendment, was clearly concerned with the "water-power sites on

Indian reservations throughout the country that will be affected by this bill." *Id.* at 1566. The amendment was agreed to. *Id.* at 1570. Further evidence that Section 10(e) was intended by those concerned with this bill to reach no further than hydro-power development is found in a letter from Gifford Pinchot to Senator Gronna, dated January 5, 1920. The letter reads, in relevant part:

> "I am writing to call your special attention to the *water-power bill* (H.R. 3184).... This bill will settle the disposition of all our remaining public *water powers*. . . .
>
> "*Section 10(e)* gives the *public water powers* away for practically nothing by relieving *licensees* from paying the reasonable value of what they get from the public. It limits the possible charge to the reimbursement of the Government for the expenses of administering the act, plus a small charge based on the value of Government lands occupied, irrespective of their *water-power possibilities*. Thus it prevents any charge being made for the enormously valuable *water-power rights* to be granted under the bill. When a municipality is to develop and use the power for its citizens a nominal charge is right and just, but when a corporation or individual is to be given publicly owned rights and make a profit from them it is clear beyond question that a reasonable charge, based on the value given, should be made.
>
> "The right to make such a charge is clear. To abandon it for the profit of the corporations would be wholly unjustifiable. The *water-power commission* should be given a free hand to charge what the rights granted are actually worth. This grave defect in the bill can be remedied by striking out the Senate committee amendment." *Id.* at 1573 (emphasis added).

There is no mention that Section 10(e) is to reach beyond water power development.

Finally, debate on a proposed amendment to H.R. 3184 which would provide "[t]hat this act shall not take effect until the expiration of three years from and after its approval by the President" indicates that "this act" provides only for water-power development. *Id.* at 1571. Senator Nugent offered the amendment because he was:

> ". . . very strongly of the opinion that the States and the counties, municipalities, and other political subdivisions of the States in which these *water-power sites* are situated should have the right to develop them for the use of the people of those States, counties or municipalities, as the case may be. According to my understanding of this bill, it contains a provision to the effect that municipalities, counties, and so on, may make application for licenses. But it occurred to me that if this bill is enacted and becomes effective within a short time, shortly thereafter practically all of the desirable sites will have been applied for by private interests.
>
> * * * * *
>
> "So far as the counties and the municipalities in Idaho are concerned, I doubt very much, although I have no definite information on the subject, *whether there is one among them that can now take out a license for the development of a water-power site. . . .*" *Id.* (emphasis added).

This amendment was opposed by Senator Nelson, who argued:

> "The country has been suffering for 8 to 10 years for the lack of *water-power* legislation. All *water-power development* has been at a standstill, and this amendment would postpone it for another three years, leaving it as though no law had been enacted. It would stay *water-power development* in Idaho, just as well as in every other State, for men who

> seek to develop *water power* want to be assured that the Government will give them permission, and without that there will be an absolute stay of all development. The amendment amounts simply to postponing the work of *water-power development* in this country for another three years, and it ought to be rejected." *Id.* (emphasis added).

The equation between the area covered by "this act" and "water-power development" could not be made more forcibly.

The conference report on H.R. 3184 was first considered by the House. *See id.* at 6381-83. The statement of the House conferees, in explaining the action of the Conference Committee, provides further evidence that the bill in general, and Section 10(e) in particular, was intended by Congress to deal only with water power development. With respect to the tribal lands amendment to Section 10(e), it was indicated that the Senate conferees receded from the amendment since the conferees "saw no reason why *water-power use* should be singled out from all other uses of Indian reservation land for special action of the council of the tribe." *Id.* at 6383 (emphasis added). In addition, the conference committee proposed a compromise Section 10(e) which contained elements of both the House and Senate versions. Section 10(e) was described as relating "to the charge imposed upon the licensee for water power developed." *Id.* at 6384. In Congressman Esch's explanation of the Conference report to his colleagues in the House, he reiterated that Section 10(e) related "to the charges for water-power development." *Id.* at 6524. In another context, Congressman Esch, in speaking of Section 17, referred to these charges as "charges derived from water-power development." *Id.* at 6524. *See*

also id., where Mr. Esch explained that the conferees "did not believe it would be advisable to [provide for federal construction of a hydro-power project at Great Falls, Maryland] through an amendment to a general water power bill . . . ." Congressman Sims opposed the compromise by the Conference Committee on Section 10(e), referring to it as "the bone of contention in every water-power fight we have ever had on this floor and in the Senate." *Id.* at 6525.

General comments made by members of the House concerning the conference report indicate that H.R. 3184 was, indeed, a "water-power bill." Congressman Treadway congratulated the conferees that "finally . . . a water-power bill has been reported that both branches seem to have agreed upon," and that provides for cooperation "between private owners and the Government for the use of the water power on navigable streams." *Id.* at 6527. Congressman Lee was equally pleased with the efforts of the Conference Committee in reporting the "water-power bill." *Id.* at 6527. His description of the bill contains many references to "water power rights." *See id.* at 6527-28. Congressman Lee, in a passing reference to Section 12, implies that perhaps the surplus water clause in Section 4(e) was intended to apply only to hydro-power uses "at" a government dam. Congressman Lee states:

> ". . . The bill provides that if the commission shall find that the *power available at any Government dam* may be advantageously used by the United States itself, or that any specific project should be developed by the United States, it shall not approve any application by any other agency, but shall report to Congress with recommendations for Government construction." *Id.* at 6527 (emphasis added).

Congressman Taylor expressed the view that H.R. 3184 protected the government and the rights of the people, while encouraging and protecting "investments in water-power development . . . ." *Id.* at 6528. Congressman Raker agreed that the legislation provided for the "proper development of the great water powers of the United States. . . ." *Id.* at 6529. Congressman Mondell felt that this "Federal legislation regulating and controlling in the interest of all the people of the country water-power development and the creation of hydroelectric energy" was well worth the effort and wait, and that it would "aid tremendously in the development of the water-power resources of the country . . . ." *Id.* at 6532. Congressman Dempsey favored the legislation, asserting that "[n]ot a pound of coal should be used where water power can be had to take its place, and there can and will be no considerable development of water power without the passage of such a measure as this." *Id.* Finally, Congressman Sinnot indicated his willingness to accept the legislation as a means "to release these vast water powers . . . ." *Id.* at 6537. The House agreed to the conference report on May 4, 1920. *Id.* at 6538-39.

Senate consideration of the conference report also clearly indicates that in passing H.R. 3184, Congress intended to pass a "water-power bill." Senator Lenroot opposed the conference report, but it is clear from his opposition that he considered the bill a measure governing water-power development. He stated his general opposition to "this water-power legislation" thus:

> "I realize . . . the very great necessity of the development of *our water power*, the great saving of coal and the effect on transportation which will

> result from the development of our water power, and I believe that inducements necessary to secure development should be offered to private capital. The difference between the committee and some of us is simply as to what inducements are necessary to secure that development. The committee evidently believes that it is necessary to go very much further in inducements than I believe is necessary to secure that development." *Id.* at 7723 (emphasis added).

Senator Hale also spoke in opposition to the bill. He recommended the adoption of certain amendments in line with his general view:

> "The purpose of this bill is not really to regulate commerce but to control water powers. As such it should not go beyond what really affects the commerce of the country." *Id.* at 7725.

Senator Hale acknowledged, however, that some legislation, such as the "present water-power act," was "undoubtedly necessary if the water-power development of the country is to be allowed to proceed." *Id.* Senator Hale was apparently concerned over the breadth of FPC jurisdiction granted in the bill:

> "[U]nder the provisions of this bill the *Water Power Commission* will, unless prevented by the Congress, assume jurisdiction over practically all of the rivers of the country. Licenses will be obtained from the commission *to erect dams and water powers.*" *Id.* at 7726 (emphasis added).

Senator King also expressed his discontent with the extensive reach of the FPC under the present bill:

> "Notwithstanding there is no plenary or other power in the Federal Government to exercise any control over the streams of the United States, except to prevent interference with their navigation,

> *this bill seeks the control of all sources of hydraulic power in the United States* as well as the control of all streams therein.
>
> "I believe a fair reading of the bill will furnish convincing proof that it seeks to control not only the water-power sites in the United States but also the corpus of the streams and the hydroelectric plants which produce electric energy, together with the power thereby developed." *Id.* at 7779 (emphasis added).

It is significant that those senators who opposed H.R. 3184 for its expansiveness never indicated the possibility that the FPC may, under the present bill, possess jurisdiction over non-hydro power plants. The Senate agreed to the Conference Report on May 28, 1920. *Id.*

VI. 1935 (74TH CONGRESS)

In Title II, Part 1, of the Public Utility Act of 1935, ch. 687, 49 Stat. 803, Congress amended the Federal Water Power Act of 1920. These amendments had been "requested by the Federal Power Commission on the basis of its experience in the administration of that act. Most of them are designed merely to clarify the act in its application to situations that have arisen in its administration." S. REP. No. 621, 74th Cong., 1st Sess. 17 (1935). The legislative history of two sections of the 1935 Act supports the view that the Federal Water Power Act in general, and Section 4(e) in particular, were intended to govern merely hydro-power development.

Section 210 of Title II, Part 1, of the 1935 Act amended Section 23 of the Federal Water Power Act. The second paragraph of Section 23 read:

> "That any person, association, corporation, State, or municipality intending to construct a

> dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States, may in their discretion file declaration of such intention with the commission, whereupon the commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this Act. If the commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws." 41 Stat. 1063, 1075.

S. 2796, the bill reported from the Senate Interstate Commerce Committee, amended this paragraph by, *inter alia,* inserting the following sentence at the beginning of the paragraph:

> "It shall be unlawful for any person, State, or municipality to construct, operate, or maintain any dam, water conduit, reservoir, powerhouse, or other works across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or *for the purpose of utilizing the surplus water or water power from any Government dam,* except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act." S. 2796, 74th Cong., 1st Sess., Title II, Part 1 § 206 (1935) (emphasis added).

The Senate Commerce Committee explains the purpose and effect of the proposed amendment accordingly:

> "[A] provision is inserted expressly making it unlawful to construct a project on any navigable waters without a license granted pursuant to the act. This latter provision is in substance the effect of the River and Harbor Act of 1899 when read with the Water Power Act. It is thought desirable to bring together in a single act the positive requirements *regarding the construction of water-power projects.* Under this subsection with the two amendments here made every person intending to construct a project which might conceivably affect any navigable waters would be under the duty of coming to the Commission. The act would be greatly strengthened by enabling the Commission to preserve control over all projects with which the Federal Government has any valid concern." S. REP. No. 621, *supra* at 47 (emphasis added).

A summary of S. 2796 prepared by the Committee of Public Utility Executives summarized the amendment to the second paragraph of Section 23 by stating it provided that it was:

> "Unlawful for any person, state or municipality to *construct or operate a dam or water power facilities* upon any waters of which Congress has jurisdiction or upon public lands or reservations except under permit or existing right of way granted prior to June 10, 1920 or license granted under this Act." Summary at 48 (May, 1935) (emphasis added).

The surplus water clause in Section 210 of S. 2796, as it passed the Senate, read: "[U]tilize the surplus water or water power from any Government dam. . . ." The operative phrase "surplus water or water power" remained in the clause, and the summary of the bill

published by the Committee of Public Utility Executives again described the bill as applying to "any person, state or municipality [planning] to construct or operate a dam or water power facilities. . . ." Summary at 44 (June, 1935).

S. 2796, as reported from the House Interstate and Foreign Commerce Committee, contained a surplus water clause which read: "[F]or the purpose of utilizing the surplus water or water power from any Government dam. . . ." The House Interstate Commerce Committee report was more ambiguous than the Senate report in addressing the scope of the provision. The House report stated, in relevant part:

> "The second paragraph of section 23, . . . is . . . amended by expressly making unlawful the *construction of any dam, water conduit, reservoir, or power house* in any of the navigable waters of the United States, or upon any of the public lands or reservations in the United States, except pursuant to a permit granted prior to June 10, 1920, or a license granted pursuant to the act.
>
> "This provision is in substance the present result under the River and Harbor Act of 1899 and the Water Power Act. Furthermore, the provision making discretionary the filing of applications for preliminary permits for the construction of projects in the nonnavigable tributaries of navigable streams is changed to make such applications mandatory. In this way, every person intending to construct a project which might affect navigation would be required to come to the Commission for a determination of the interests of the United States. This would greatly strengthen the act by enabling the Commission to maintain control over all projects with which the Federal Government has any valid concern." H.R. Rep. No.

1318, 74th Cong., 1st Sess. 25-26 (1935) (emphasis added).

The summary prepared by the Committee of Public Utility Executives remained less ambiguous, however, and stated the provision dealt with "a dam or water power facilities. . . ." Summary at 42 (June 27, 1935) (preliminary draft, never published).

As reported from the Conference Committee, Section 210 of S. 2796 amended the second paragraph of Section 23 by, *inter alia*, inserting the following section to begin what is presently Section 23(b):

> "It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or *utilize the surplus water or water power from any Government dam*, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act." H.R. REP. No. 1903, 74th Cong., 1st Sess. 46 (1935) (emphasis added).

The House conferees explained this amendment of Section 23 thus:

> "Section 23(b) as carried in section 210 of the Senate bill provided that it should be unlawful for any person 'for the purpose of developing electric power', to construct dams or other works on navigable waters or public lands or 'to utilize' surplus water or water power from any Government dam except under a license or other authority granted prior to 1920. The words quoted were

> not in the House amendment, but are incorporated in the conference substitute, with the addition that works 'incidental thereto' come within the prohibition." Statement of the Managers on the Part of the House, *id.* at 74.

The Public Utility Act of 1935 was approved August 26, 1935. The Committee of Public Utility Executives described Section 210 of the Act as pertaining merely to the construction or operation of "a dam or water power facilities. . . ." Summary at 32 (Sept. 1935).

The legislative history of Section 210 is relevant to a determination of the scope of the surplus water clause in Section 4(e) since it too contains the language "surplus water or water power." The Senate report on the bill expressly states that this section pertains merely to the "construction of water-power projects." This view is reinforced by a private organization's consistent interpretation of Section 210 as concerned with the construction and operation of "a dam or water power facilities." This view is neither contradicted nor expressly supported by the subsequent House report and conference report on the bill.

The second amendment enacted in 1935 which is relevant to the determination of the scope of the Federal Water Power Act of 1920 is the amendment of Section 10(e) provided for in Section 206 of Title II, Part 1, of the Public Utility Act. Section 10(e) of the Federal Water Power Act applies broadly to the "reasonable annual charges" paid by the "licensee." 49 Stat. 803, 843. The Senate report on S. 2796, in describing the proposed amendment to Section 10(e), states:

> "Several minor changes are made in section 10(e), relating to the charges to be paid by

licensees. The charge to be fixed by the Commission for the purpose of reimbursing the United States for the cost of administration is limited to the cost of administering this part of the act, instead of the entire act. This makes no change in the present situation, but *confines the charges to those needed for the administration of the water-power provisions.*" S. REP. No. 621, *supra* at 45 (emphasis added).

The House Report on S. 2796 does not explicitly describe Part 1 of the Federal Power Act as "the water-power provisions," but does apparently conceive of a licensee as operating a "project."

> "There are several minor changes in section 10(e) relating to the charges to be paid by licensees. The amount to be fixed for the purpose of reimbursing the United States for the cost of administration is limited to the present amount by the provision that the base is the cost of administering this part of the act, not the entire act, which would include the new parts II and III. The Commission's authority to adjust all charges from time to time is made express. It is also made clear that the adjustment of charges for licenses involving the use of Government lands shall be made 'by the Commission'; the time of such adjustment is calculated from the time the *project* is available for service, instead of from the beginning of operation; . . ." H. R. REP. No. 1318, *supra* at 24 (emphasis added).

The conference report on S. 2796 merely refers to the tribal lands amendment. H. R. REP. No. 1903, *supra* at 73. Thus, the Senate report on S. 2796 provides further support for the view that Part 1 of the Federal Power Act regulates merely hydro-power development. The House report and the conference report on the bill do not contradict this notion.

ITEM 2

FINDINGS OF FACT, JICARILLA APACHE TRIBE v. MORTON, ET AL., 3 ERC 1919 (1972), AFF'D, 471 F.2d 1275 (9TH CIR. 1973)

Findings of Fact

From a review of the pleadings, memoranda, affidavits, exhibits and all matters filed herein which it appears to the Court the parties stipulated and intended that the Court take into consideration in determining this case, the Court adopts as its Findings of Fact those proposed or submitted by the intervenors; therefore,

It Is Ordered that the Findings of Fact proposed by the intervenors herein and heretofore submitted to the Court are hereby adopted as the Findings of Fact of this Court the same as if fully set forth herein.

* * * * *

Findings of Fact

Four Corners Project

1. The Four Corners Power Plant is located on the Navajo Indian Reservation near Farmington, New Mexico. The Plant consists of five coal-fired steam electric generating units. Units No. 1 and No. 2 were placed in commercial operation in 1963. Unit No. 3 was placed in commercial operation in 1964. These three units are owned and operated by Arizona Public Service Company. Units No. 4 and No. 5 are owned as tenants in common by Arizona Public Service Company (15%), El Paso Electric Company (7%), Public Service Company of New Mexico (13%), Salt River Project Agricultural Improvement and Power District (10%), Southern California Edison Company

(48%), and Tucson Gas and Electric Company (7%). Arizona Public Service Company operates Units No. 4 and No. 5 as Operating Agent for the owners of these units. Unit No. 4 was placed in commercial operation in July, 1969. Unit No. 5 was placed in commercial operation in July, 1970.

2. The Four Corners Plant was originally established in 1960, when Arizona Public Service Company obtained a site lease for a power plant from the Navajo Tribe. The instruments relating to this lease were:

(a) Indenture of Lease between the Navajo Tribe of Indians and Arizona Public Service Company, signed by the parties on December 1, 1960, and approved by the Secretary of the Interior on December 14, 1960.

(b) Wholesale Power Supply Agreement between Arizona Public Service Company and the Navajo Tribe of Indians, signed December 1, 1960 and approved by the Secretary of the Interior on December 14, 1960.

3. On July 6, 1966, by provisions of the "Arizona § 323 Grant" from the Secretary of the Interior and by provisions of the Supplemental and Additional Indenture of Lease, rights-of-way and easements were granted to Arizona Public Service Company for use in connection with Units 1, 2 and 3.

4. Units No. 4 and No. 5 were added to the Four Corners Generating Station pursuant to the following instruments:

(a) "§ 323 Grant", granting multiparty rights-of-way and easements, for the enlarged station, by the Secretary of the Interior was signed on July 6, 1966.

(b) Supplemental and Additional Indenture of Lease (which also supplemented and modified the 1960 Lease to Arizona Public Service Company) between the Navajo Tribe of Indians and all owners, signed by the parties May 27, 1966 and approved by the Secretary of the Interior, July 6, 1966.

5. Coal for each of the five units is supplied by Utah Construction and Mining Company from lands under lease from the Navajo Tribe since 1957. Water for use of Units 1-5 (about 51,600 acre-feet annually) is obtained from the San Juan River under diversion rights granted by the New Mexico State Engineer in 1955. A water service contract approved by Congress was executed by the Secretary of the Interior in April 1968 with Utah Mining and Construction Company for 44,000 acre-feet of water from the Navajo Reservoir, a Bureau of Reclamation facility, for possible future development of coal resources.

6. Based on environmental provisions included in the 1966 lease, the lessees are required to install the best pollution control equipment then available in all five units and to periodically update such equipment. The plants are required to operate in compliance with criteria specified in the lease. The technology of pollution control equipment is subject to periodic review by the Secretary of the Interior to determine if updating is necessary. Arbitration is provided if differences of opinion should arise concerning the implementation of these provisions.

7. On October 22, 1970, federal approval was given for the design of scrubbers to be installed on Units 1, 2 and 3. The only pending request for approval now before the Department of the Interior for the Four

Corners Plant concerns the design of air pollution control equipment to be added to Units 4 and 5 which will materially reduce particulate emissions.

8. With respect to Units 6, 7 and 8 at the Four Corners site, no federal action has been taken since January 1, 1970, and no federal actions are pending. At this time, these units are a potential future site for one or more fossil-fueled generating units similar to a large number of other potential sites scattered throughout the Southwest.

9. As of January 1, 1970, it was not practicable to reassess the basic course of action with respect to the Four Corners Project.

10. Federal action on the Four Corners Project since January 1, 1970, has been shaped to minimize adverse environmental consequences.

11. An environmental impact statement has not been prepared with respect to federal action on the Four Corners Project.

MOHAVE PROJECT

12. The Mohave Project consists of two 755,000 kw coal-fired steam electric generating units located in Clark County, Nevada. The related Eldorado Transmission System includes 57 miles of jointly owned 500 kv transmission line connecting the Mohave Project with the jointly owned Eldorado substation near Boulder, Nevada. The Eldorado Transmission System consists of three major components:

(a) The Mohave-Eldorado 500 kv Transmission Line;

(b) The No. 1 and No. 2 Eldorado-Mead 200 kv Transmission Lines;

(c) The Eldorado Substation Site.

13. The participants in this project are: Southern California Edison Company ("Edison") (56%), Salt River Project Agricultural Improvement and Power District (10%), Nevada Power Company (14%), and the Department of Water and Power, City of Los Angeles (20%). The major components of the Eldorado Transmission System are owned by some or all of the participants in various different percentages.

14. The plant is constructed on non-Federal, non-Indian lands. Coal is supplied to the plant from the Black Mesa in Arizona by a 275-mile underground slurry line. The coal is mined from Indian lands under leases dated February 1, 1964, and June, 1966, between Sentry Royalty Company and the Navajo Tribe for approximately 24,858 acres and 40,000 acres, respectively. A June, 1966 lease between Sentry Royalty Company and the Hopi Tribe covers the same 40,000 acres as are covered in the latter lease with the Navajo Tribe. Sentry Royalty Company's rights have been assigned to Peabody Coal Company, with the approval of the Navajo and Hopi Tribes.

15. Preliminary studies relating to the selection of the site for the Mohave Project were under way as early as 1962 in which the economics, water availability, fuel availability pertaining to various sites were explored. A decision was made in 1965 to construct the Mohave Project at its present site on a joint ownership basis.

16. On October 26, 1966, the United States conveyed fee title to certain lands, including the plant site, to the Colorado River Commission of Nevada (the "Commission") which, on the same date, conveyed title to Edison of the Mohave Plant Site.

17. On October 26, 1966, the United States entered into a Contract for Delivery of Water with the Commission to deliver to the Commission not more than 30,000 acre feet of the State of Nevada's annual allocation of 300,000 acre feet allotted under the Boulder Canyon Project Act by contract dated March 30, 1942, as supplemented January 3, 1944, between the United States, the State of Nevada, and its Commission. In turn, on the same date, the Commission entered into a Water User Contract with Edison pursuant to which the Commission agreed to deliver to Edison not to exceed 30,000 acre feet of water for use in connection with the Mohave Project. The Water User Contract obligates Edison to perform the obligations of the Commission under its contract with the United States. The rate of diversion of water delivered was limited to not in excess of 50 cubic feet per second. The contract contains further provisions requiring Edison to prevent any significant and measurable pollution of the waters of the Colorado River, intermittent tributary streams of underground waters and/or any measurable return of waste water thereto by reason of development, operation return or activities on the plant site unless otherwise agreed by the Commission and the Secretary of the Interior. All designs and plans for waste water, waste material and sewage disposal facilities were required to be submitted to the Secretary for his written approval in advance of construction or installation and in advance of any modification or removal thereof. The agreement further provides that nothing in the contract would be construed to relieve Edison from complying with all valid applicable water pollution control regulations under Federal, State or County jurisdiction then or thereafter in force.

18. The Water User Contract required the prior written approval by the Secretary of the Interior of construction, installation, removal or major modification of air pollution control equipment employing the most effective, commercially proven, electrostatic concept available under the technology known at the time of design of said facilities, and Edison was required to operate such equipment so as to remove not less than 97% of the particulate matter in the stack emissions in each month and not less than 96% thereof in any 24-hour period, subject to deviations arising from uncontrollable forces. The contract also specified the height of the plant stack to be not less than 500 feet above ground grade and requires a review not less often than every 10 years of technological advances in air pollution control equipment to determine the feasibility of installing additional equipment or modifying existing equipment, taking into account the costs as well as the benefits of improved air pollution control. The contract called for the monitoring of the operation and efficiency of the air pollution control equipment and the furnishing of monthly reports showing the average month assay of the ash and sulphur content of the coal employed. The contract also provides that nothing therein would be construed as to relieve Edison from complying with all valid applicable air pollution control laws and regulations under Federal, State or County jurisdiction then or thereafter in force.

19. The Water User Contract obligated Edison, unless the Secretary of the Interior otherwise approved, to use coal mined from the Black Mesa area located on Indian Reservation land in Arizona as the fuel supply for the plant, with exceptions permitting the use of natural gas for ignition purposes at all times, and

natural gas or other coal in the event of emergencies or unavailability of such coal.

20. On December 12, 1966, the Mohave Project Preliminary Agreement between Nevada Power Company, Salt River Project, and Edison was entered into to establish in a preliminary way the responsibility for construction and operation of the Mohave Project, the participation shares of each of the parties, an outline of the definitive agreements required to be negotiated and executed, and a reservation of the right of Edison to make available a 20% interest in the project to The Los Angeles Department of Water & Power. The Plant Site Conveyance and Co-Tenancy Agreement dated May 29, 1967, between Nevada Power Company, Salt River Project and Edison, and the Plant Site Conveyance and Co-Tenancy Agreement Assignment between Edison and The Los Angeles Department of Water & Power dated December 23, 1968, definitively established the ownership shares of the participants in the project and additional contracts among the participants were negotiated and signed at various dates from June, 1967, through December, 1968, when the participation of The Los Angeles Department of Water & Power was finalized.

21. On January 6, 1967, Edison and a predecessor in interest of Peabody Coal Company entered into the Mohave Project Coal Supply Agreement calling for the delivery by means of a 275-mile 16 inch coal slurry pipeline from lands held under mining leases dated February 1, 1964, from the Navajo Indian Tribe and from the Hopi and Navajo Indian Tribes, the latter lease covering the two tribes' undivided interests in lands within a Reservation created by the 1882 Executive Order of the President of the United States. The

Mohave Project Coal Supply Agreement provides for the delivery of a minimum of 117 million tons of coal to the Mohave Project plant site over a 35-year period. Plans for the pipeline crossing of the Colorado River were approved by the Department of Interior, January 11, 1967.

22. On May 29, 1967, undivided interests in the plant site, the Water User Contract and the Coal Supply Agreement were assigned by Edison to Nevada Power Company and Salt River Project, and on December 23, 1968, an undivided interest in land and in the Water User Contract and Coal Supply Agreement were assigned to The Los Angeles Department of Water & Power.

23. Construction of both units commenced June 1, 1967, and on January 1, 1970, Unit 1 was 70% complete, Unit 2 was 40% complete, with overall construction 55% complete. To that date total expenditures aggregated approximately $110 million. Contractual commitments for approximately $200 million of the estimated final cost now estimated at $234 million had been made.

24. Pursuant to the provisions of the Water User Contract, the following federal approvals were granted: plans and designs for air pollution control (1968); designs and specifications for the ash disposal facility (October, 1970); plans and specifications for additional sewerage facilities for a maintenance building (January, 1971); plans for draining excess waste water from evaporation pond (March and April, 1971); and plans and specifications for construction of a second industrial waste water evaporation pond (April, 1971).

25. By June 1, 1971, construction of Unit 1 had been completed and was in commercial operation. At that

date, construction of Unit 2 was 90% complete, with overall construction of the project 95% complete. An aggregate of approximately $200,700,000 had been expended. Unit 2 is now in commercial operation.

26. Applications on behalf of Nevada Power Company, Salt River Project and Edison for transmission rights-of-way were filed October 11, 1968, with the Bureau of Land Management and were granted by Decision issued December 5, 1968. Applications on behalf of all four participants were filed February 27, and April 22, 1969, for rights-of-way and easements covering respectively the Eldorado Substation and the Mohave-Eldorado 500 kv transmission line. The applicable rights-of-way and easements for the Eldorado Substation were acquired by Decision dated August 7, 1969, and for the transmission line by Decision dated December 30, 1969, which was corrected on January 8, 1970, to include The Los Angeles Department of Water & Power in conformity with the original application. Construction of the Eldorado Transmission System commenced December 1, 1968, and it was placed in operation December 16, 1969, at a cost of approximately $20 million.

27. There are no pending approval actions in the Department of the Interior for the Mohave plant except design of a proposed increase in the capacity of the waste water pond.

28. As of January 1, 1970, it was not practicable to reassess the basic course of action with respect to the Mohave Project.

29. Federal actions on the Mohave Project since January 1, 1970, have been shaped to minimize adverse environmental consequences.

30. An environmental impact statement has not been prepared with respect to federal actions on the Mohave Project.

NAVAJO PROJECT

31. The Navajo Project consists of the following components:

(a) Three coal-fired electric generating units having a nameplate rating of 750 megawatts each, located approximately five miles east of Page, Arizona.

(b) A 79-mile coal haul railroad which will transport coal from Peabody Coal Company's Black Mesa Mine located on the Navajo and Hopi Indian Reservations to the plant site for the Navajo Generating Station.

(c) A 500 kv electric transmission line to transmit power and energy from the Navajo Generating Station to the McCullough Substation located in Southern Nevada.

(d) Two 500 kv electric transmission lines to transmit power and energy from the Navajo Generating Station to the Westwing Substation located in Northwest Metropolitan Phoenix.

32. The participants in the Navajo Project are Arizona Public Service Company (14%), Salt River Project Agricultural Improvement and Power District (21.7%), United States of America (24.3%), Tucson Gas & Electric Company (7.5%), Nevada Power Company (11.3%), Department of Water and Power, City of Los Angeles (21.2%). The United States was authorized to participate in the plant to supply power for the Central Arizona Project by P.L. 90-537, 82 Stat. 885, Act of September 30, 1968.

33. The decision to locate the Navajo Generating Station near Page, Arizona, was reached after an intensive study of the need for power in the future, the locations of a fuel source and cooling water, proximity to transmission facilities and load centers for the participants, and social and environmental factors. In June of 1968, Secretary of the Interior Stewart Udall met with representatives of various organizations which had expressed an interest in additional electric generating capacity in the Southwest. As a result of the meeting, a joint study committee was formed and designated as the Navajo-Four Corners Steering Committee. The Steering Committee undertook as its task the investigation of the feasibility of developing major coal-fired thermal electric generating stations at Page, Arizona, Four Corners, New Mexico, and any other suitable alternate location.

34. After an intensive investigation by eight separate task forces, the following conclusions were reached:

(a) Based upon the load growth in the area, expressions of interest of potential participants and economic transmission system development, there was need for three 770 megawatt units in the years 1974, 1975 and 1976.

(b) The most economical alternative to supply these requirements would be the installation of three 770 megawatt units at a site located near Page, Arizona, which would be fueled by coal from Black Mesa coal deposits on lands leased by Peabody Coal Company from the Navajo and Hopi Indian Tribes. It was further concluded that the most economical means of transporting the coal from the Black Mesa Mine to the plant site would be by train.

(c) The capacity generated by the three 770 megawatt units could be economically transmitted to the load centers of the utilities expressing an interest in participating in the Navajo Project over three 500 kv lines. One 500 kv line would go from the Navajo Generating Station west to the McCullough Substation, located in the southern tip of the State of Nevada near Boulder City. Two 500 kv lines would go from the Navajo Generating Station plant site south to a point in northwest Phoenix. Each of the participants in the Navajo Project would then require additional transmission facilities so as to transmit their entitlement from the Navajo Generating Station from the terminus of the 500 kv system into their respective systems.

(d) The Navajo Project offered the most economical source of pumping capacity for the Central Arizona Project.

35. On September 30, 1969, the Secretary of the Interior filed with Congress the report required by the Colorado River Basin Project Act advising Congress of his findings that participation in the Navajo Project represented the most suitable alternative for supplying the power requirements of the Central Arizona Project. Shortly thereafter, and prior to December 31, 1969, the participants entered into the Navajo Project Participation Agreement dated as of September 30, 1969, obligating them to proceed with the Project.

36. The participants in the Navajo Project were committed to proceed with this project as of September 30, 1969, and the fact that the National Environmental Policy Act of 1969 was to become effective on January 1, 1970, did not influence in any way the date on which the participants in the Navajo Project committed themselves to proceed with the Project.

37. The generating station is located on Navajo tribal lands. The Navajo Tribal Council entered into an agreement for lease of these lands in September, 1969. The lease was approved by the Department of the Interior in December, 1969. A water service contract (14-06-400-5033) for up to 34,100 acre-feet of consumptive use annually was executed by the Department of the Interior January 17, 1969. A grant of various rights-of-way, easements, and access roads was approved by the Department of the Interior in December, 1969.

38. Under the water service contract and other project agreements, the owners are required to install the most effective commercially proven electrostatic or equally effective air pollution control equipment then available, periodically update such equipment, and operate the plant in compliance with operational criteria specified therein. The contract does not relieve the contractor from compliance with applicable, Federal, State and local air and water pollution control standards. Disagreement as to the implementation of these provisions is subject to arbitration.

39. The coal for the Navajo Project is to come from Black Mesa, Arizona. Part of the coal lease is on Navajo tribal lands and part is on a joint use area of the Navajo and Hopi Tribes. The Navajo Tribe entered into two coal mining leases (14-20-0603-8580 and 14-20-0603-9910) in 1964 and 1966, respectively. The Hopi Tribe entered into a coal mining lease (14-20-0450-5743) in June, 1966. The coal is to be hauled by rail 78 miles to the plant site. An application by the plant participants for rights-of-way and easements from the Navajo Tribe for the coal-haul railroad was approved in January, 1971.

40. Prior to January 1, 1970, the participants in the Navajo Project had expended funds and entered into contracts for the purchase of equipment and services for the Navajo Project. The amount involved in these expenditures and contracts totaled $107,437,000 as of January 1, 1970. Actual physical construction of the Navajo Generating Station commenced in April of 1970, and actual physical construction of the Coal Haul Railroad commenced in February of 1971.

41. Pursuant to the terms and conditions of the Water Service Contract of January 17, 1969, and the Indenture of Lease with the Navajo Tribe, the Department of the Interior must review and approve the plans for the following major systems relating to air and water quality control:

(a) Chimney
(b) Lake Pumping Station
(c) Ash Handling Equipment
(d) Ash Disposal Area
(e) Sanitary Sewage
(f) Process Waste Disposal
(g) Particulate Removal Equipment
(h) SO_2 Removal Equipment
(i) Coal Handling Facilities
(j) Waste Water Drainage and Discharge
(k) Coal Pile Stabilization
(l) Pollution Monitoring Instrumentation

42. The non-federal participants in the Navajo Project must receive the power to which they are entitled from the Navajo Project by the projected completion dates for the three units of that Project, June, 1974, 1975 and 1976 respectively, in order to supply the anticipated requirements of their customers. It is nec-

essary that the construction schedules be essentially met in order to have the generating units in commercial operation as required. Unavailability of power from the Navajo Project according to schedule would place in serious jeopardy the ability of the participants to serve their customers.

43. Following a determination by the Secretary of the Interior that such actions were necessary to permit the project to proceed in accordance with the established construction schedules and that these particular approvals could not be delayed to permit preparation and filing of a final environmental impact statement, the Department of the Interior approved the license agreement for the pipeline and holding reservoir for water and coal haul railroad construction in April, 1970, a water service agreement for plant construction in 1970, an easement for water intake pipeline in October, 1970, a section 323 Grant covering the railroad right-of-way in January, 1971, plans and specifications for the waste water treatment plant in March, 1971, a water service contract for construction of the coal haul railroad in April, 1971, and the chimney height in May, 1971.

44. In 1969, Bechtel Corporation, Morrison-Knudsen Company, Inc. and Dames & Moore were employed by Salt River Project, the Project Manager, to make independent studies concerning the environmental aspects of the Navajo Generating Station and coal haul railroad. In no case has the Salt River Project or any of its officers, agents or employees dictated to these companies the conclusions that they were to reach in these studies and the studies have in fact been independent.

45. Subsequent to January 1, 1970, each of the environmental systems related to the Navajo Generating Station has been re-evaluated and substantial modifications made in the environment systems as a result of this reevaluation. Prior to January 1, 1970, it was estimated that the environmental systems relating to the Navajo Generating Station would cost $28,010,000 and, as of November 1, 1971, it is estimated that the environmental systems will cost $138,360,000.

46. On January 1, 1970, it was not practicable to reassess the basic course of action established by the participants in obligating themselves to proceed with the Navajo Project. However, alternates to each of the environmental systems have been reviewed and substantial alternations made in these systems in order to minimize their adverse environmental impact. The following major environmental systems have been reassessed since January 1, 1970:

(a) The original design for the Lake Pumping Station called for extending pipes over the cliffs of Lake Powell. These pipes would have been visible from the Lake. Since January 1, 1970 the design of the water in-take facilities was modified and present plans call for slant drilling so as to avoid any defacement of the Lake Powell cliffs and to recess the Lake Pumping Station so that it will not be visible from any point on Lake Powell.

(b) The original plans for the Navajo Generating Station called for returning up to 5,900 acre feet of cooling tower blowdown to Lake Powell. The return of water was permitted under the terms and conditions of the Water Service Contract entered into between the Salt River Project and the United States Bureau of Reclamation. After extensive hydrologic and environmental studies, it was concluded subsequent to January

1, 1970 not to return any water to Lake Powell notwithstanding the fact that the return of the cooling tower blowdown would have no appreciable environmental effect. This decision was made following consultations with representatives from state agencies in the States of Colorado, New Mexico, Utah, Arizona, Nevada and California, and with representatives from several federal agencies, including the Environmental Protection Agency, National Park Service and the Bureau of Sport Fisheries and Wildlife.

(c) The original plans for the Navajo Generating Station called for cold precipitators for fly ash collection. Subsequent to January 1, 1970 a decision was made to install hot electrostatic precipitators because their collection efficiency is not affected by the sulfur content in the coal and it is anticipated that they will provide a higher degree of collection efficiency and be more reliable.

(d) The original plans for the Navajo Generating Station did not call for SO_2 removal systems. Subsequent to January 1, 1970 a decision was made to install SO_2 removal systems on all three units. This decision was made after extensive meteorological studies and after consultation with representatives from the Tennessee Valley Authority, United States Bureau of Reclamation, Environmental Protection Agency and the Arizona State Health Department.

(e) The original plans for the Navajo Generating Station did not contain any provision providing for flexibility in boiler combustion. Subsequent to January 1, 1970 a decision was made to modify the boilers to permit greater flexibility in combustion so as to provide an opportunity for reducing the formation of nitrogen oxides in the combustion process.

(f) The original plans for the Navajo Generating Station did contain provisions for dust abate-

ment. Since January 1, 1970 additional dust abatement facilities have been planned for installation at the Navajo Generating Station.

(g) Modifications have been made in the design of the Navajo Generating Station since January 1, 1970 to improve the appearance of the Generating Station. These include housing the turbine generators, using high intensity lights on the stacks rather than painting them red and white, and improved color treatment to better blend in with the surrounding area. All of these modifications have resulted in substantial increased costs. In addition, since January 1, 1970 a reassessment has been made of the environmental systems, both major and minor, and numerous improvements made in the minor environmental systems.

47. The participants in the Four Corners, San Juan, Mohave, Navajo and Huntington Canyon Plants requested that the meteorological consultants for these projects jointly assess the cumulative impact of these plants on air quality in the Colorado River Basin. The conclusions of that study were as follows:

(a) Based on the considerations of local winds, terrain effects and professional judgment, the Colorado Plateau region can be divided into specific "air sheds." The Four Corners and San Juan Plants are in the same air shed. Each of the other plants is in a separate air shed.

(b) Evidence indicates little significant meteorological interaction between these air sheds during stagnant conditions.

(c) Because each major effluent source is located within a different air shed, contaminants from each major source will not interact under stagnant conditions. (The Four Corners and San Juan power plants were considered as a single source for the purposes of this study.)

(d) During a postulated 23-day stagnation period (January 4-27, 1968), the area was ventilated three times. Even if extended periods of stagnation were to take place, the natural pollutant removal processes of the atmosphere would limit the buildup of contaminants.

(e) Meteorological studies indicate that stagnation may last as long as thirteen days in this area. However, each separate air shed should be evaluated further since the degree of stagnation, and its consequences, will vary among the different locales.

48. In 1971, the Hydraulics and Hydrology Group of Bechtel, Incorporated, researched and computed the effects of the San Juan, Four Corners, Navajo, Kaiparowits and Mohave thermal electric power plans on the water quality of the Colorado River.

The conclusions of this investigation were as follows:

(a) The net withdrawal of salts from the River by the five plants will be about 166,000 tons per year, under the assumption of a withdrawal of 208,000 acre feet per year.

(b) The withdrawal of water is in accordance with the Water Service Contracts executed between the United States and the respective utilities, the apportionment of water to the States of Utah, New Mexico and Arizona, and the Law of the River.

(c) As the usage of water in the Upper Basin is increased to develop fully the allocations to the respective states, it may be expected that the water presently released downstream in excess of contract requirements will be reduced. Consequently, there will be less surplus water available to dilute downstream return flows and other sources of salt concentration.

(d) Under present modified conditions the effect of the five power plants on salt concentrations at

Lee Ferry will be zero; below Hoover Dam, salinity will increase by 0.4 percent or 3 ppm. At Imperial Dam the projected increase will be about 7 ppm under the 1941-1966 present modified conditions or 10 ppm under projected future inflow conditions; against background salinities of 832 ppm and 869 ppm, respectively, these increments amount to 0.8 and 1.2 percent. It will be nearly if not entirely impossible to detect these increments with standard methods of chemical water quality analysis and instrumentation as used by the U.S. Geological Survey. Since the incremental salinity cannot be subjected to measurement, it seems clear that effects, economic or otherwise, will also be unmeasurable.

(e) Releases to Mexico will continue to be made in full accord with Treaty requirements. In addition, drainage wells and bypass drains have been constructed and reservoir operating procedures have been adopted to minimize salinity in the water crossing the International Boundaries. The effect of the diversions to the five power plants on the quality of water delivered to Mexico will, at worst, cause no more than about 1 percent increase in concentration, and may, in fact, cause a decrease in concentration.

(f) The only planned return of water to the River from the withdrawal will be from a "blowdown" from the Four Corners cooling pond. There will be no return of water or salt to the River from the other four plants.

(g) The salt removed from the blowdown water will be largely disposed of in impermeable ponds to prevent return seepage and upon completion of the plant operation the ponds will be buried to prevent blowing of dry salts over the area.

(h) The addition of the five large thermal electric power plants to the economic and indus-

trial structure of the Colorado River Basin is in full accord with the planned development of the water resources of the Basin. The plants will not create significant unforeseen problems of water availability or water quality.

49. The Secretary of the Interior has determined that, with the exception of the Four Corners and San Juan Plants, the cumulative environmental effect of the following described plants:

Plant	Unit No.	Size (MW)	Date of Oper.
Four Corners	1	175	'63
Four Corners	2	175	'63
Four Corners	3	225	'64
Four Corners	4	775	'69
Four Corners	5	775	'70
Mohave	1	755	'71
Mohave	2	755	'71
San Juan	1	330	'73
San Juan	2	330	'77
Navajo	1	750	'74
Navajo	2	750	'75
Navajo	3	750	'76
Huntington	1	430	'73
Huntington	2	430	'78

is not significant and that each of the above described plants can be treated as separate entities from an environmental standpoint and from the standpoint of the application of the Environmental Policy Act.

50. The Secretary of the Interior has made the following substantive decisions pertaining to the Navajo Project:

(a) The basic course of action calling for the timely completion of the Navajo Project was not subject to reassessment as of January 1, 1970.

(b) Certain incremental federal actions, as described in Section 11 of the Guidelines, had to be taken prior to the filing of the Final Environmental Statement.

(c) As of February 4, 1972, the Secretary had adequate information on the basis of which to prepare and file a Final Environmental Statement pertinent to the Navajo Project.

(d) As of February 4, 1972, the Department of the Interior had in all respects complied with the procedural requirements of the National Environmental Policy Act as they apply to the Navajo Project.

51. A draft environmental statement pertaining to all aspects of the Navajo Project was filed with the Council on Environmental Quality on October 5, 1971, following earlier filings made some four months prior thereto on individual aspects of the Navajo Project. Copies of the draft environmental statements were circulated to interested parties, as set forth more fully in the statement itself. The Final Navajo Environmental Statement was filed with the Council on Environmental Quality on February 4, 1972.

52. The Final Navajo Environmental Statement adequately performs the responsibility prescribed by the National Environmental Policy Act, including the analysis of the five factors required to be analyzed by that statute, assessing and evaluating alternates, and

sets forth relevant data to be considered by governmental decision-making authorities in taking major federal action having a significant effect on the environment.

53. The Department of the Interior made an independent assessment of the environmental and economic consequences of the Navajo Project and utilized and relied upon expert information from the Tennessee Valley Authority, the National Oceanic and Atmospheric Administration, and the Environmental Protection Agency, and independent studies made by consultants employed by the participants in the Navajo Project.

54. There are now pending before the Secretary of the Interior—and have been pending in excess of six months while the preparation of Section 102 statements has proceeded—applications for federal approvals necessary for the Navajo Project. Delay in making these approvals beyond about the middle of March would result in very substantial construction delays, which in turn would result in seriously jeopardizing the Navajo participants to complete the Navajo Project according to schedule and supply the power needs to their customers.

HUNTINGTON CANYON PROJECT

55. Utah Power & Light Company, Salt Lake City, Utah, is constructing an electrical generating station in Huntington Canyon, Utah, approximately 29 miles by road southwest of Price, Utah. The plant will utilize coal from an underground mine approximately 2½ miles from the station to be operated by Peabody Coal Company. A 430 mw unit is planned to be on the

line in 1974. The plant is located 235 miles northwest of the Four Corners Plant and 170 miles north of the Navajo Station site. Its site is primarily on state and privately owned lands, although the company was issued a Bureau of Land Management five-year temporary use permit on March 11, 1971, for approximately forty acres.

56. Planning for the project commenced in 1966 when the Power Company's ten-year load forecast showed that additional generating capacity would be required by the year 1974. Lead time from planning to operation of a new steam plant requires seven to eight years. A detailed study of nine sites located in Utah, Wyoming, and Idaho was made in 1967 and 1968. The study took into account basically seven factors, namely:

(a) Availability of fuel.

(b) Availability of water.

(c) Cost of plant and supporting facilities, including land, road and railroad access to site.

(d) Proximity of plant site to major load centers to minimize electrical transmission distances.

(e) Environmental impact of the plant and its associated facilities.

(f) Availability of labor to support the plant complex during both the construction and operating stages.

(g) Acceptance of the plant complex by the local community.

This study resulted in the choice of Huntington Canyon area as the optimum site for the generating plant.

57. The availability of coal and water were first investigated in 1967, and this investigation continued through the remainder of 1968. A letter of intent covering coal purchases was executed in September, 1969. Efforts were then pressed for preparation of plans for the plant, for the reservoir and for the transmission line.

58. Discussions for purchase of water stock from private companies were completed and a contract was signed in December, 1969. Acquisition of options for purchase of water from individual stockholders began in 1969. Application for a reservoir was filed in 1968 and site investigation and engineering were commenced in the fall of 1969. Negotiations were also started with interested governmental agencies for relocation of the Huntington Canyon highway.

59. Bids were invited for the turbo-generator and boiler, and a letter of intent to purchase the turbo-generator was issued August 17, 1969. Selection of an engineering firm was started in 1969. A weather study was commenced the same year.

60. The engineering contract was awarded to Stearns-Rogers on March 17, 1970, and the letter of intent to purchase the boiler was submitted. Design and engineering of the plant site, clearing, grubbing, and preparation of specifications for the procurement of major equipment were started. Weather studies were continued.

61. Planning for the construction of the transmission line also commenced in 1966 when the company's ten-year load forecast revealed that the company would not be able to meet its load requirements by 1974 without additional generation and transmission ca-

pacity. The first physical efforts to select a route from Camp Williams to the Huntington area were made by airplane in the winter of 1968. Early in 1969, negotiations with the United States Forest Service and the Bureau of Land Management commenced, looking toward the acquisition of approval for the line. Authorization to begin work on surveying and mapping was given to Engineering Enterprises on May 9, 1969, and a formal contract awarded July 26, 1969.

62. In November, 1969, BLM consulted Utah Power to ascertain the alignment of the proposed line in relation to public lands so that the impacts of the proposed project on the environment could be carefully evaluated.

63. A field review of the entire route of the proposed line in Utah was made by representatives of the Asst. Secretary for Water and Power, Bureau of Land Management, Bureau of Reclamation, Bureau of Indian Affairs, U.S. Forest Service, Utah Power & Light Company, the press (including the Salt Lake Tribune, Deseret News) and T.V. (including KSL-TV in Salt Lake City). Wide publicity was given by press and T.V. to the concern for the environment under the government's new environmental standards, and the opportunity for public comment on the proposal.

64. Based on detailed on-site examinations of the proposed route, BLM required several changes to preserve natural beauty, esthetic, historic, archeological, and other public values on BLM administered public lands. These changes were made prior to the filing of the formal application by Utah Power & Light Company on January 8, 1970.

65. No objections to the construction of the line were received by BLM and after careful consideration of the environmental aspects of the proposed project, together with Power Marketing Recommendations signed February 5, 1970, by the Assistant Secretary for Water and Power Development, the right-of-way was approved. The survey was 65% complete by January 1, 1970; design engineering was being completed; material requisitions were prepared, construction contracts had been prepared and bids received; right-of-way was being purchased and the bulk of material orders had been placed. The company received approval for a right-of-way over public lands from the Bureau of Land Management in February, 1970. The line was put into service on June 26, 1971. The total cost of the line and appurtenant facilities was approximately $26,800,000.

66. Delay of the construction of the company's first unit at Huntington Canyon, now scheduled for service in June, 1974, would render it impossible for the company to satisfy its load demands projected for 1974. The capability of this unit amounts to approximately one-third of the Utah system capability at that time. This generation cannot be replaced with a practical alternative in the less than three years remaining. A loss of generating capability of this relative magnitude would seriously jeopardize the reliability of service to customers.

67. The major impact from a moratorium on the first unit at Huntington Canyon to the Utah Power and Light Company would be:

(a) System reserve capability would change from a maximum of +15% to a—8% in 1974, and

sufficient capability would not remain to supply all the firm load. The resulting reliability and continuity of the service would be unacceptable to customers and would result in wide-spread damage.

(b) Considerable monetary loss would be suffered by the company, resulting from funds already expended and committed on the Huntington Canyon Project. It is estimated that one year's delay would result in an increased construction cost of approximately $6,000,000.

(c) Maintenance required on existing units would be curtailed since contemplated reserves would be wiped out. The already unacceptable reliability resulting from loss of the Huntington unit would further deteriorate.

68. As of January 1, 1970, it was not practicable to reassess the basic course of action with respect to the Huntington Canyon Project.

69. Federal action on the Huntington Canyon Project since January 1, 1970, has been shaped to minimize adverse environmental consequences.

70. A draft environmental impact statement prepared by the Bureau of Reclamation (Huntington Canyon Generating Station and Transmission Line, March, 1971) was sent to the Council on Environmental Quality and circulated for review and comment in April, 1971. A final statement has not yet been filed.

SAN JUAN PROJECT

71. The participants in this project are Tucson Gas & Electric Company ("Tucson") and Public Service Company of New Mexico ("New Mexico"). Two units are presently planned with a capacity of about

330 megawatts each. One unit is under construction with scheduled operation in 1973. No planned dates have been announced for operation of the other unit. The plant is to be constructed on non-Federal, non-Indian lands.

72. The growing demand for electricity and the need for additional generating facilities, together with the availability of low sulphur coal and water in the area, necessitated the decision to construct the San Juan coal-fired steam generating plant near Farmington, New Mexico.

73. On November 1, 1961, New Mexico acquired two (2) coal leases from the Bureau of Land Management covering 4,912 acres in San Juan County, New Mexico. On August 13, 1963, rights under a Bureau of Land Management coal lease, contiguous to the other lease, covering 1,800 acres in San Juan County, New Mexico, were acquired.

74. On March 22, 1968, Senate Joint Resolution 123, being Public Law 90-272, authorized a "water contract" between the United States and New Mexico which allowed the United States to release to New Mexico 20,200 acre feet of water annually from the Navajo Reservoir. The "water contract" was signed April 11, 1968, and clearly indicates that the proposed use of water was for thermal electric generation.

75. The "water contract" required New Mexico to install and operate equipment employing the most effective and acceptable equipment available under the technology known at the time of the design of the plant in order to minimize smoke, fly ash and dust in stack emissions. Designs and plans for the air pollution control equipment, stack and other plant features that

might affect air pollution were subject to written approval by the Secretary of Interior or his designated agent in advance of construction, installation, removal or major modification. Periodic review of the equipment by the Secretary was included in the contract and disputes were made the subject of arbitration.

76. Because of the necessity of substantial lead time, a turbine generator was the subject of a letter of intent from New Mexico to Westinghouse Corporation dated October 11, 1967. This letter was modified on December 10, 1968.

77. As of July 25, 1969, Tucson had agreed to participate in the proposed generating station on an equal basis with New Mexico.

78. On August 1, 1969, a firm order was placed for the steam turbine generator at a price of approximately $6,500,000. By letter of October 20, 1969, Stearns-Rogers Corporation was selected to engineer and construct the first unit at the San Juan station. On November 17, 1969, New Mexico committed itself to purchase the boiler for the San Juan generation station at a cost of approximately $9,000,000.

79. On January 1, 1970, the San Juan Plant was an existing project or program and as of that date it was not practicable to reassess the basic decision that the project be constructed.

80. On April 1, 1970, the Bureau of Land Management approved modification of a 1961 mining lease by increasing the lease by 120 acres, which land was contiguous to the existing leases and did not consist of an area large enough for independent development. Such lands would have been isolated if not included within said lease.

81. The Department of Interior selected the Tennessee Valley Authority to examine the air pollution control devices proposed to be installed at the San Juan Plant. After that study and consultation with the National Air Pollution Control Administration, the United States Department of Health, Education and Welfare, and the New Mexico Department of Public Health and Social Services, the Secretary of Interior's designated agent approved the design of the air pollution control equipment by letter dated October 21, 1970, in accord with the approval rights in the contract of April 11, 1968. Because of the need for substantial lead time in ordering the air pollution control equipment, it was necessary to issue the approval at the time it was done. The approval was shaped so as to minimize adverse environmental consequences. It requires that particulate emissions are not to exceed 0.05 pounds per million Btu heat input. The equipment ordered is guaranteed by the manufacturer to remove 99.5% of the particulate matter. The guarantee is well over the water contract minimum level.

82. Federal action since January 1, 1970, has been shaped to minimize adverse environmental consesequences.

83. A statement in accord with Section 102(2)(C) of the National Environmental Policy Act with regard to the San Juan Project is now being prepared.

KAIPAROWITS PROJECT

84. The Kaiparowits Project consists of interests under coal mineral leases relating to lands on the Kaiparowits Plateau in Kane County, Utah, water appropriation and water service rights, and interests in

applications for rights-of-way and plant sites, which are jointly owned in equal undivided interests by the corporations named below, with the objectives of:

(a) Establishing procedures and principles for the initiation of specific projects for the production and utilization of recoverable coal, water supply and plant sites, and

(b) Establishing methods of development of the coal reserve area in an orderly manner with the utilization of coal resources for electric generation or for other uses to be agreed upon by the three participants named below.

85. The Kaiparowits Project is a resource development project as distinguished from a project for the construction of a power generating plant. There are no existing agreements or obligations with respect to constructing a power generating plant or any other facilities for utilization of the coal and water. No federal action has been taken with respect to this project since January 1, 1970.

86. The ownership interests in the Kaiparowits Project are as follows:

Resources Company, a subsidiary of Arizona Public Service Company 33⅓%.

Mono Power Company and/or Associated Southern Investment Company, subsidiaries of Southern California Edison Company 33⅓%.

New Albion Resources Company, a subsidiary of San Diego Gas & Electric Company 33⅓%.

87. In October, 1969, the owners executed a water service contract to take 102,000 acre feet annually from Lake Powell. This contract contains air and water

pollution control provisions similar to those contained in the contracts for the Navajo plant and the other plants.

88. The owners received coal leases from the Bureau of Land Management in November, 1965.

89. An environmental impact statement has not been prepared with respect to federal actions to date on the Kaiparowits Project.

THE SOUTHWEST ENERGY STUDY

90. To meet confirmed power needs in the Southwestern United States, there now are five coal-fired generating plants distributed over a wide area with units in service or with units under construction and to be completed by 1977. These plants and their anticipated 1977 operating capacities are as follows:

Plants	No. of Units	Generating Capacity-mw	Units Completed
Four Corners	5	2,162	5
Mohave	2	1,580	2
San Juan	2	690	—
Huntington Canyon	1	430	—
Navajo	3	2,310	—
Totals	13	7,172	7

91. There is no feasible way to substitute other power generating resources for these five power plants so that the concerned utilities will be able to meet their load responsibilities through 1977. Contributing considerations include engineering lead time required for design and construction of power systems and the problems of capital accumulation. Already, $1.8 billion

has been spent or commited for the construction of these power plants, including transmission lines, coal mines, and associated facilities.

92. The Southwest Energy Study does not deal with the need for the five power plants described above. The existence and production of those plants are basic underlying assumptions for the study. The study is primarily concerned with future proposed electric production and distribution facilities, *i.e.*, new areas and new projects that are not under construction.

ITEM 3

TABLE OF OWNERSHIP OF POWER PLANTS

Ownership of Power Plants

Plant	*Owner*	*Percentage*
Mohave		
	Southern California Edison Company	56
	Nevada Power Company	14
	Department of Water & Power, City of Los Angeles	20
	Salt River Project Agricultural Improvement & Power District	10
Navajo		
	United States of America	24.3
	Salt River Project Agricultural Improvement & Power District	21.7
	Arizona Public Service Company	14
	Tucson Gas & Electric Company	7.5
	Nevada Power Company	11.3
	Department of Water & Power, City of Los Angeles	21.2
Kaiparowits		
	Arizona Public Service Company	18
	Southern California Edison Company	40
	San Diego Gas & Electric Company	23.4
	Salt River Project Agricultural Improvement & Power District	10
	Unassigned	8.6
Huntington		
	Utah Power & Light Company	100
San Juan		
	Tucson Gas & Electric Company	50
	Public Service Company of New Mexico	50
Four Corners		
First 3 units	Arizona Public Service Company	100
Units 4 & 5	Arizona Public Service Company	15
	El Paso Electric Company	7
	Public Service Company of New Mexico	13
	Salt River Project Agricultural Improvement & Power District	10
	Southern California Edison Company	48
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Supreme Court of the United States

OCTOBER TERM, 1974

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.,
Petitioners

v.

FEDERAL POWER COMMISSION

ARIZONA PUBLIC SERVICE COMPANY, ET AL.,
Petitioners

v.

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.

FEDERAL POWER COMMISSION,
Petitioner

v.

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.

JOSEPH J. BRECHER
JOHN E. ECHOHAWK
1506 Broadway
Boulder, Colorado 80302
Attorneys for The Chemehuevi Tribe of Indians, et al.

Of Counsel:
Native American Rights Fund

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BRIEF FOR THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.

INTRODUCTION

The issue in this case is whether a new technological phenomenon, the energy complex, fits within the regulatory scheme contained in a statute enacted a half century ago,

long before such a development could have been foreseen. A consortium of private power companies is in the process of erecting a network of energy-producing facilities in the "Four Corners" region of the Southwest. The major features of this energy complex are six huge electric generating plants fueled by locally available strip mined coal.[1] These six plants are interconnected by ultra-high voltage transmission lines, which enable them to form one huge power-producing grid to supply load centers in metropolitan areas on the fringes of the Four Corners region. All draw immense amounts of cooling water from the Colorado River system. Two of the plants will draw their cooling water from Lake Powell, which is impounded by the Glen Canyon Dam, a federal reclamation project. The other four depend on upstream government dams for a dependable supply of cooling water. Together, their impact on the flow of that stream is significant.

Electricity is produced by three different methods: steam power, water power, and atomic power. (The latter method is not involved in this case and will not be discussed further.) At a steam power plant, a fossil fuel, such as coal, is used to convert water in a boiler to steam. The expansion of the steam turns a turbine which is then used to generate electricity. Large quantities of cooling water are needed for this process in order to increase the efficiency of the steam expansion process.

Water power, or hydroelectric power, uses the force of water falling over a dam to drive a turbine, which then generates electricity. All six power plants involved in this case are steam plants.

The Chemehuevi Tribe of Indians, the Cocopah Tribe of Indians, the Committee to save Black Mesa, and the individ-

[1]The six plants include Four Corners and San Juan, near Farmington, New Mexico; Huntington Canyon, near Price, Utah; Navajo, on Lake Powell, near Page, Arizona; Mojave, at the Southern tip of Nevada; and the Kaiparowits plant, now in the advanced planning stage, to be located somewhere on the Kaiparowits Plateau on the Utah side of Lake Powell.

ual respondents are all residents of the area affected by the Southwest Energy Complex. The Sierra Club is a national organization dedicated to restoring and preserving environmental quality, many of whose members reside in the same area or use it for recreation. (These parties are referred to in this brief as "the Indian respondents.") Dismayed by the major environmental degradation associated with the operation of the six plants and apprehensive that these impacts would increase as the plants expanded, the Indian respondents were shocked to learn that there was no agency, state or federal, exercising any effective regulatory authority over the Southwest Energy Complex.

This, despite the fact that § 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), gives the Federal Power Commission jurisdiction to issue licenses "to citizens of the United States . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction. . . ." The same section also authorizes the issuance of a license "for the purpose of utilizing the surplus water or water power from any government dam."

Since the operations of the six plants clearly fall within both of these statutory definitions, the Indian respondents filed a complaint with the Commission, requesting it to order the owners of the six plants to show cause why they should not be required to apply for licenses under the Federal Power Act (App. 1a). The commission, *sua sponte*, dismissed the complaint, alleging that it had jurisdiction over hydroelectric but not over steam plants under the Federal Power Act (App. 22a). After an application for rehearing was denied by the Commission (App. 28a), the Indian respondents appealed to the United States Court of Appeals for the District of Colum-

bia Circuit, pursuant to 16 U.S.C. § 825*l*(b). In a lengthy opinion (App. 38a-112a), the Court of Appeals ruled that the Commission did have jurisdiction to license steam electric plants that use surplus water from a government dam and remanded the case to the Commission to determine whether the six plants were, in fact, using such water, and whether the Commission's jurisdiction was "affected in any way by the jurisdiction of any other federal agency." However, the Court ruled that steam plants were not covered under the project works clause, relying primarily on its reading of the legislative history of the Federal Power Act, prior administrative construction, and dictum to that effect by this Court in *FPC v. Union Elec. Co.*, 381 U.S. 90 (1965). The government and power companies then petitioned this Court for writs of certiorari and the Indian respondents filed a cross-petition on the "project works" portion of the decision. All three petitions were granted by this Court on June 10, 1974.

SUMMARY OF ARGUMENT

1. Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), authorizes the Commission to issue licenses for the purpose of constructing "project works" for the development of power on any stream over which Congress has jurisdiction. The coverage of the statute is not specifically limited to "hydroelectric" power and the facilities at the six plants involved in the case fall within the definition of "project works." Furthermore, the six plants are indisputably using "surplus water or water power from a government dam" in their operations. Thus, under the literal language of the statute, the six plants are subject to licensing jurisdiction under two separate clauses of the Act.

Under the "plain meaning" rule, there is a very strong presumption that a statute should be interpreted literally, without resort to extrinsic aids such as legislative history, if the statutory language is unambiguous. Only if a literal reading would lead to a result completely at variance with the statutory purposes may the Court depart from the strict language of the statute.

2. Application of FPC licensing jurisdiction to steam plants, far from subverting the intention of Congress, would further a basic purpose of the Federal Power Act — to curb attempts by private power interests to appropriate for themselves the public's valuable resource in the power potential of navigable streams. This was one of the most important objectives Congress had in mind when it passed the Federal Power Act.

3. The legislative history invoked by the government and the power companies does not show that Congress affirmatively intended to limit FPC jurisdiction to water power plants, as opposed to steam plants, forever and under all circumstances. It merely shows that the Congress was not thinking at all about whether steam plants should be regulated

when it enacted the Federal Power Act. Such a showing is insufficient to vary the unambiguous language of a statute.

Congress' failure to consider regulation of steam power plants was understandable because it was concerned with supervising the use of water by the power industry. Since steam plants at that time had virtually no effect on waterways, their regulation would not have been necessary to carry out the statutory purpose. However, technological changes which have made possible the development of today's steam electric energy complexes have rendered that assumption inaccurate. Today, in fact, large steam plants can have a much greater effect on waterways than any hydroelectric facility.

Comprehensive legislation designed to regulate the activities of an industry for the public's benefit is broadly construed by the courts so that new developments which could not have been anticipated by the drafters of the legislation are deemed to be covered by the act, in order to ensure that its general purposes will be carried out. To do otherwise would impose an impossible burden on the Congress: to anticipate and name every conceivable type of activity that should be subject to regulation.

4. None of the other extrinsic factors urged by the power companies and the government compel the conclusion that the statute does not mean what it says. The Commission's interpretation, though long-held, is erroneous, is not supported by an intelligible reasoning process, and is not entitled to the respect accorded to a contemporaneous administrative construction of a new statute. This Court's dictum indicating that the Commission has no jurisdiction over steam plants should not govern in this case. It was reached in a non-adversary context and based on the assumption that steam power plants have no effect on waterways.

5. The court below was correct in its ruling that the six plants are jurisdictional under the surplus water clause. To accept the interpretation of the power companies and the government that the clause applies only to hydroelectric plants would render it nugatory, in violation of a cardinal principle of statutory construction. The term "surplus water" had a definite, established meaning, independent of water power at the time the Federal Power Act was passed and there is no evidence that Congress did not use the term as it was commonly understood.

6. The environmental degradation associated with the operations of the six plants in this case offers an eloquent testimonial to the need to fill the "regulatory gap" under which the siting of steam power plants has escaped federal regulation. The Federal Power Commission, itself, has recommended that it be given precisely the powers that the Indian respondents claim it already has. Whatever difficulties there would be in implementing such jurisdiction under the terms of the Federal Power Act would be more than offset by the advantages to be obtained by following Congress' original intent to achieve comprehensive regulation of the Nation's waterways.

7. The regulatory authority of the Federal Power Commission discussed above is not superseded by the broad water allocation authority of the Secretary of the Interior under the "Law of the Colorado River." The nature and purposes of the powers given to the two agencies are substantially different. Concurrent jurisdiction over various phases of the same project is relatively common in federal administrative law and the courts are cognizant of this phenomenon. Furthermore, the language of the statutes which, it is claimed, ousts the FPC from jurisdiction on the Colorado River actually indicates that Congress specifically meant for that jurisdiction to continue. Administrative actions by both the

FPC and the Interior Department confirm this interpretation. Finally, water for two of the six plants involved in this case are not at all under the jurisdiction of the Secretary, so at the very least the issues remain justiciable as to those two plants.

ARGUMENT

I. THE STATUTORY LANGUAGE UNAMBIGUOUSLY GRANTS JURISDICTION; THUS, IT IS UNNECESSARY TO RESORT TO EXTRINSIC AIDS TO CONSTRUCTION.

This case involves the fundamental question of whether a statute should be construed so that it means what it says, or whether highly debatable historical theories and attempts at psychoanalysis of Congressmen in office more than a half century ago will prevail over common sense and the English language. The court below ruled that one clause of the statutory section in question "does indeed mean what it says" (App. 101a), but that another clause does not. The government and the power companies argue that *neither* clause means what it says, citing legislative history that shows Congress never thought about the problem involved in this case, at all. The Indian respondents suggest that speculation about the probable views of an ancient Congress and Commission concerning a technological phenomenon that could not then have been anticipated should not be allowed to override the plain and obvious meaning of the words Congress wrote.

Even if one elects to pursue the will o' the wisp of "legislative intent," one finds that the power companies' activities here are precisely the type of evil Congress had hoped to curb through regulation by the Federal Power Commission. In effect, the power companies argue that they may, by means of the back door, appropriate the public's valuable ownership of an almost priceless resource — the power potential in the Colorado River — because they have discovered a technological means to do so which Congress did not have the foresight to anticipate half a century ago. But Congress used general language in the Federal Power Act so as to avoid this kind of result. The courts, realizing the practical impossibility of drafting *any* regulatory statute so as to an-

ticipate all future technological changes, consistently apply that general language to new developments in the regulated industry.

A. *The statutory language.*

The controversy in this case revolves around the meaning of two clauses of § 4(e) of the Federal Power Act, 16 U.S.C. § 797(e). That section authorizes the Federal Power Commission to issue licenses, *inter alia,* for two purposes:

> [F]or the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction. . . .
>
> [O]r for the purpose of utilizing the surplus water or water power from any Government dam. . . .[1]

The term "project works" mentioned in the above paragraph is defined as "the physical structures of a project. . . ." 16 U.S.C. § 796(12). "Project," in turn, is defined as a

> complete unit of improvement or development, consisting of a powerhouse, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part

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[1]The Federal Power Act provides for enforcement of the Commission's licensing jurisdiction in § 23(b), 16 U.S.C. § 817(b):

> It shall be unlawful for any person . . . for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, powerhouse, or other works incidental thereto across, along, or in any of the navigable waters of the United States . . . or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of . . . a license granted pursuant to this chapter.

> of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith . . . all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit. 16 U.S.C. § 796(11).

There can be no doubt that the six power plants involved in this case fall within the language of the "project works" clause. The power companies are, in fact, constructing, operating and maintaining the types of facilities mentioned in § 4(e), such as water conduits, powerhouses and transmission lines, for the development and transmission of power across, along, from, or in navigable streams. The statute does not require that the project works be used to generate *hydroelectric* power, but merely "power."

There is virtually unanimous agreement on this point. The court below conceded: "It is true, as petitioners point out, that the literal language of § 4(e) appears to include steam plants" (App. 53a). But the Court of Appeals was convinced that extrinsic factors, such as the Power Act's legislative history, militated against such an interpretation. The government, too, concedes that "the bare words" of the statute "do not themselves conclusively limit that subsection's applicability to hydroelectric power plants" (Brief, p. 15).

Willard Gatchell, former general counsel of the Federal Power Commission, also expressed the opinion that the "project works" clause authorized jurisdiction over steam plants:

> Under this grant of authority, the Commission could issue a license for a steam-electric power plant located on a navigable stream, which utilized the water of such stream for condensing purposes

> and transmitted the power so generated across, along, or from such stream. Also, a power development utilizing steam rather than water power as a generating force could well have most of the physical structures listed in Section 3(11) of the statute in the definition of "project." Thus, there is no express limitation of the licensing authority to hydroelectric power plants as distinguished from steam-electric power plants. W. Gatchell, *Jurisdictional Problems Under the Federal Water Power Act of 1920,* 14 Geo. Wash. L. Rev. 42, 44 (1945).

Only the power companies attempt to argue that steam plants cannot be "project works," asserting that some of the structural and hydraulic features listed in the statutory definition are found only at hydro plants, not steam plants: "The steam plant's water system is keyed to pumps, not turbines, lifting water uphill, not directing it downhill, for consumption in conversion of energy supplied by fuels, not by falling water" (Brief, p. 45). But this Court has already ruled against this position. *FPC v. Union Elec. Co.*, 381 U.S. 90 (1965), held that the Commission had licensing jurisdiction over pumped storage projects. Pumped storage projects, like steam plants, use energy supplied by fossil fuels to pump water uphill. This water is stored in a reservoir, to be released and allowed to run downhill to provide an additional power supply at peak demand periods (App. 80a, n. 98). (It takes about three units of heat energy to produce two units of potential hydro energy at a pumped storage plant. *See Scenic Hudson Preservation Conference v. FPC*, 354 F.2d. 608, 612 (2d Cir. 1965), *cert. denied*, 384 U.S. 941.)

It is equally indisputable that the six plants are using "surplus water from a government dam" for the purpose of developing electric power and the court below so found

(App. 101a). The "surplus water" clause is discussed at Point V of this Brief.

B. *The "plain meaning" rule.*

The "plain meaning" rule has long been a cardinal principle of statutory construction. Indeed, the court below briefly acknowledged the existence of this principle (App. 54a) and then proceeded to ignore it. Perhaps the best statement of this doctrine was made by Mr. Justice Frankfurter in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617 (1944):

> We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. . . . To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another.

The opinion went on:

> After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him. 322 U.S. at 618.

See also Malat v. Riddell, 383 U.S. 569, 571 (1966); *Crane v. Commissioner*, 331 U.S. 1, 6 (1947); *Helvering v. Hutchins*, 312 U.S. 393, 396 (1941); *City of Lincoln v. Ricketts*, 297 U.S. 373, 376 (1936); *Old Colony R.R. v. Commissioner*, 284 U.S. 552, 560 (1932).

As we showed above, the language of § 4(e) unequivocally and unambiguously covers steam plants. In an uninterrupted line of cases, this Court has indicated that where there is no ambiguity, there is "nothing to construe." *National Home, D.V.S. v. Wood*, 299 U.S. 211, 216 (1936).

In *United States v. Missouri Pacific R.R.*, 278 U.S. 269 (1929), this Court declined to consider the import of Congressional debates on a bill because:

> . . . Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed. 278 U.S. at 278.

See also United States v. Oregon, 366 U.S. 643, 648 (1961) and *Connecticut L. & P. Co. v. FPC*, 324 U.S. 515, 527 (1945), in which this Court held that general language in the Federal Power Act favoring state regulation "cannot nullify a clear and specific grant of jurisdiction [to the FPC], *even if the particular grant seems inconsistent with the broadly expressed purpose*" (emphasis added).

Mr. Justice Jackson, in his usual eloquent fashion, explained why the plain meaning rule makes sense:

> I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a

> Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute. *United States v. Public Utilities Comm'n*, 345 U.S. 295, 319 (1953), concurring opinion.

(The majority had entered into an examination of legislative history in *United States v. Public Utilities Comm'n* because it felt the statutory language was ambiguous and also to see whether the literal words would bring about an end "completely at variance with the purpose of the statute." 345 U.S. at 315.)

This principle has been applied by this Court in two decisions that are analogous to the present case. In *Fairport, P. & E. R.R. v. Meredith*, 292 U.S. 589 (1934), this Court was called upon to decide whether the Federal Safety Appliance Act, 45 U.S.C. § § 1 and 9, could be invoked by a motorist who was hit by a train. The train was not equipped with power brakes, as required by the Safety Act. In *Fairport*, as here, it was argued that the Safety Act occupied a narrow field and was "intended only for the protection of employes and travelers upon the railroads, and has no relation to the safety of travelers upon highways or of the public generally." 292 U.S. at 594. There, as here, the literal language of the statute unquestionably covered the fact situation before the Court, and the activity complained of was plainly within the range of evils with which Congress intended to deal (*see* Point II *infra*), but there was some legislative history indicating that Congress may not have believed that the coverage of the statute would extend that far. And there, as here, the title of the statute seemed to restrict its coverage. Nonetheless, the Court ruled that the Safety Act could be invoked by persons other than employees and passengers. Because of the peculiar relevance of the Court's reasoning to the present case, a rather lengthy quotation is in order:

> The contention of petitioner is that the Federal

Safety Appliance Act was intended only for the protection of employes and travelers upon the railroads, and has no relation to the safety of travelers upon highways or of the public generally. Very likely, the primary purpose in the mind of Congress was to protect employes and passengers. So much is indicated by the title — "An act to promote the safety of employes and travelers upon railroads," etc. And this is borne out by the history of the legislation. President Harrison in his first annual message to Congress called attention to the need of legislation for the better protection of the lives and limbs of those engaged in operating the interstate freight lines of the country, and especially the yard men and brakemen, and expressed the view that Congress had power to require uniformity in the construction of cars used in interstate commerce and the use of approved safety appliances upon them.

But we are asked to hold that the title expresses the sole intent of the act, and this involves a question of statutory construction. The title of an Act and the history leading up to its adoption, as aids to statutory construction, are to be resorted to only for the purpose of resolving doubts as to the meaning of the words used in the act in case of ambiguity. [citations] But here the words of . . . the act speak plainly and nothing in the nature or operation of the legislation requires, or suggests the necessity of, an appeal to extrinsic aids to determine their meaning . . . [T]he installation and use of power brakes . . . so obviously contribute to the safety of the traveler at crossings that it is hardly probable that Congress could have con-

templated their inapplicability to that situation. 292 U.S. at 594-95.

Packard Motor Co. v. NLRB, 330 U.S. 485 (1947) is another case in which this Court opted for an expansive reading of the coverage of a regulatory statute on the basis of its broad language, despite substantial evidence that Congress did not discuss, and therefore presumably did not intend, such wide jurisdiction. The question was whether the National Labor Relations Act ("NLRA") required Packard to enter into collective bargaining with a union made up entirely of foremen. The statute conferred the right to collective bargaining on "any employee." The company contended, however, that foremen more nearly fit into the statutory definition of "employer": "Any person acting in the interest of an employer, directly or indirectly. . . ." Thus, the company reasoned, foremen were not covered by the Act.

This Court first noted that it "is too obvious to be labored" that "foremen are employees both in the most technical sense at common law [and] in common acceptance of the term." 330 U.S. at 488. As for the definition of "employer," which seemed to include foremen and thereby to place them outside the Act's protection, the Court reasoned that *every* employee is required to act "in the interest of the employer." Thus, foremen should not be consigned to the employer category (and consequent exemption from the NLRA) just because they advance the company's interests.

Expressing awareness that foremen, even if they do act for the employer in dealings with manual laborers, "still have interests of their own as employees" (330 U.S. at 489), the Court noted that nothing in the language of the NLRA indicated that Congress had withheld protection for foremen taking collective action to advance those interests.

The Court refused to examine proffered extrinsic aids to interpretation: "There is, however, no ambiguity in this Act

to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law." 330 U.S. at 492.

The dissenters argued that the legislative history (which the majority declined to peruse) strongly indicated that Congress did not want foremen to be covered under the Act. The dissent noted that: "The evil at which the Act was aimed was the failure or refusal of industry to recognize the right of workingmen to bargain collectively." 330 U.S. at 496. According to § 1 of the NLRA, this refusal to bargain had been the cause of strikes and other disruptions. But, the dissenters pointed out, workmen, not foremen and other management personnel, had been aggrieved and were striking. They also noted that the statute was replete with references to "workers" and "laborers," but never mentioned supervisors. 330 U.S. at 497.

Finally, the dissenters argued, if Congress had intended for foremen to be covered, that fact would have been mentioned somewhere in the legislative history. But they found:

> [N]o trace of Congressional concern with the problems of supervisory personnel. The reports and debates are barren of any reference to them, though they are replete with references to the function of the legislation in protecting the interests of "laborers" and "workers." 330 U.S. at 498.

This same sort of "legislative history" is invoked by the government and the power companies. They point out that the Federal Power Act contains several references to water power, but none to steam power. (*See, e.g.*, power companies' Brief, pp. 45-46; government's Brief, pp. 16, 17-18.) And they note that the debates indicated a concern for promoting and regulating hydro plants, not steam plants. (*See, e.g.*, power companies' Brief, pp. 55-56; government's Brief, p. 23.) These are precisely the kinds of arguments rejected by

this Court in the *Packard* case. The teaching of *Packard* is clear: in the face of unambiguous statutory language that appears to include a type of activity within its coverage, a court will not do violence to the plain meaning merely because Congress did not allude to that type of activity specifically in the course of enacting the legislation.

The opinion below conceded the general validity of the Indian respondents' "plain meaning" argument. But the Court of Appeals maintained that, though the statutory language was unambiguous, it was still justified in examining and relying on extrinsic evidence which it believed led to the conclusion that the straightforward interpretation of the statute was inappropriate. It relied on the narrow exception to the "plain meaning" rule for cases in which "the literal words would bring about an end completely at variance with the purpose of the statute," described by the Court in *United States v. Public Utilities Comm'n*, 345 U.S. at 315.

Common sense indicates that this exception would be applicable only rarely, since Congress seldom enacts statutory language whose meaning is "completely at variance" with its intent. Therefore, it appears obvious that anyone seeking to invoke this exception has a heavy burden of persuasion. While the government and the power companies offer a great deal of evidence which, they contend, shows that Congress did not intend to include steam plants in the jurisdiction of the Commission, nowhere do they show how that jurisdiction is "completely at variance" with the purpose of the Federal Power Act. They simply could not do so, for, as the Indian respondents show in the next section, FPC jurisdiction over steam plants would in fact *further* one of the basic purposes of the Federal Power Act.

II. A MAJOR PURPOSE OF THE FEDERAL POWER ACT WAS TO PREVENT PRIVATE POWER INTERESTS FROM APPROPRIATING THE VALUABLE PUBLIC RESOURCE OF THE POWER POTENTIAL IN NAVIGABLE STREAMS; THAT IS PRECISELY WHAT THE SIX PLANTS IN THIS CASE ARE DOING.

The Indian respondents do not quarrel with the assertion that a primary purpose of the Federal Power Act was to promote the development of hydroelectric (as opposed to steam) facilities (*see, e.g.*, government's Brief, pp. 19-23; power companies' Brief, p. 52, and Supplement, pp. 45S-46S). But that was not the *only* purpose of the legislation. As Arizona Public Service Co., et al. noted in their brief below (p. 24), the early conservationists, who were the strongest backers of the Federal Power Act, were intent on protecting and making sure that the public received adequate compensation for "the valuable asset of water power potential."

The conservationists were particularly anxious to stop the private power interests from appropriating this resource for themselves, without any supervision by or benefit to the public. As the court below noted, they "decried what they saw as a great giveaway of the Nation's water resources to private interests and a callous disregard of the interest of the public in a comprehensive system of water management that would benefit the public at large" (App. 62a). *See also* Note, *Expanding Jurisdiction of the FPC and the Problem of Federal-State Conflict*, 18 Vand. L. Rev. 1847, 1861-62 (1965). Gifford Pinchot, characterized by Arizona Public Service Co. as "the leader of the conservationists" and a "champion of a great cause" (brief below, p. 25), did not mince words on this subject. In one law review article, he wrote:

> Until 1905, when the first steps were taken to bring about effective regulation and control by the government of the right to erect and maintain power

> dams, the custom of Congress to give away these extremely valuable rights continued unbroken. Unless some other interest happened to be after the same power site, all that was necessary was to get a bill introduced in Congress and sit by and watch it pass as a matter of course.
>
> This time-worn habit of Congress to give away the public property was, of course, wholly unnecessary and wholly without excuse. G. Pinchot, *The Long Struggle for Effective Federal Water-Power Legislation*, 14 Geo. Wash. L. Rev. 9 (1945).

At various points, Pinchot called private power interests that sought to usurp the power potential in public waters "water power grabbers" (*Id.* at 16), their acts "piracy" (*Id.* at 17), and their objective "plunder" (*Id.* at 18).

The leading scholar on the history of the Federal Power Act describes how this massive pilferage occurred:

> [N]o one can deny the influence and power of an enormous business interest with funds to employ talented, persuasive, lobbying attorneys. For ten years, tremendous pressure was brought to bear upon Congressmen by power companies. It is not to be wondered at. It is the old story. When clever legal representatives of rich corporations could fashion their arguments to play upon those prejudices of legislators built upon theories of state sovereignty or of *laissez-faire*, they were all but invincible. J. Kerwin, *Federal Water-Power Legislation* 8 (1926).

This same theme — a determination to stop the monopolistic power industry from grabbing off the Nation's waterways — runs strongly through the Congressional committee reports on the Federal Water Power Act of 1920 and its predecessors. For example, the court below quotes from the

House report on H.R. 16673, one of the earliest versions of the Federal Water Power Act (App. 63a):

> Experience has taught us that in the past the private monopolization of natural opportunities has not only deprived the general public of their natural right to a proper share of the benefit which should accrue from them, but such monopolization has given to those possessing it a proponderance of influence and of power in our industrial and civic life which is little short of a menace to our institutions.
>
> We have awakened none too soon to the necessity of preserving under public control these great natural opportunities for the creation of wealth, which belong to the public and which could constitute a serious source of danger to equal liberty and fair opportunity if transferred in perpetuity to private ownership.[1]

The report presented data developed during committee hearings showing that a few very large corporations controlled virtually all the water power then in existence. It concluded that the public interest demanded continuing government control over water so that it would not be "developed as perpetual private monopolies."[2]

The report of the House Committee on Public Lands which accompanied the earliest antecedent of the Power Act, H.R. 16673 (the "Ferris bill"), passionately declared that to allow private power companies to appropriate for themselves the

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[1]H.R. Rep. No. 842, Development of Water Power, etc., 63rd Cong., 2d Sess. 11 (1914).

[2]*Id.* at 14. President Theodore Roosevelt, another ardent champion of the conservationist cause, also condemned the "evils of monopoly" by the power companies and urged Congress to "stop giving away the property of the people in the flowing waters." Address vetoing the Rainy River Project (1908), quoted in J. Kerwin, *supra* at 118.

power potential in navigable streams "ceases to be a mistake; it becomes a crime." H.R. Rep. No. 842, 63rd Cong., 2d Sess. 10 (1914). *See also FPC v. Union Elec. Co.*, 381 U.S. 90, 98, n. 11 (1965).

The power companies in the present case are nonetheless succeeding in appropriating this public resource for their own benefit for the purpose of producing electric power; in the process they are actually diminishing the hydroelectric power production capacity of public power facilities. Meanwhile, the agency charged by Congress to prevent this evil blithely asserts that, though the literal language of its enabling statute seems to authorize action, and though it believes that its intervention in such a situation would be a desirable policy (*see pp. 73-74 infra*), it cannot act, because Congress did not mean it to do so.

The six power plants involved in this case will withdraw 250,000 acre feet of water annually, over 2 percent of the flow of the Colorado River, for cooling purposes and projected increases in power plant capacity along that River and its tributaries may ultimately raise this total to 5 percent[3] (App. 52a). Almost none of this water will be returned to the River. Thus, this huge electric power complex will diminish the potential for production of power at federal hydroelectric facilities at Boulder, Glen Canyon, and other downstream government dams by a substantial amount. If ever there was a "need for integration of federal activities of waterways"[4] — the function of the FPC — this is it.

A second major purpose of the Federal Power Act was to secure "a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation. . . ." *First Iowa Hydro-Elec. Coop. v.*

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[3]This cooling water is an integral part of the steam electric power production process (*see p. 43 infra*).

[4]United States ex rel. Chapman v. FPC, 345 U.S. 153, 167 (1953).

FPC, 328 U.S. 152, 180 (1946). This goal is separate and distinct from that of promoting the development of water power. Indeed, the comprehensive planning responsibility imposed by § 10(a) of the Federal Power Act, 16 U.S.C. § 803(a), may sometimes dictate that "deferral of construction would be more in the public interest than immediate construction. . . ." *Udall v. FPC*, 387 U.S. 428, 449 (1967).

The disastrous impact of the Southwest Energy Complex on the environment and the water economy of the lower Colorado River basin is notorious.[5] The Senate Interior Committee attributed this chaotic situation primarily to the "inadequate planning and coordination" of these activities by the numerous state and federal agencies that were involved.[6] This is the very type of planning and coordination authority Congress thought it was giving to the Federal Power Commission. But because of the Commission's dogmatic and somewhat bewildering refusal to exercise the powers given to it by Congress, poor electric power site planning, of which this case offers a glaring example, will continue. This unnecessary "regulatory gap," which has so far been felt only locally, will rise to the level of national insanity if the present inertia is allowed to continue. As the court below noted, steam electric power plants are expected to be using 600 billion gallons of cooling water a day by the year 2000, an amount equivalent to one-half the total daily runoff of the entire country (App. 50a-51a). The effect of this tremendous water use by steam plants on the power potential in navigable streams is self-evident and so is the proposition that allowing it to continue unregulated flies in the face of Congress' intent.

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[5]*See generally* S. Rep. No. 92-1015, 92d Cong., 2d Sess. (1972); Comment, *The Four Corners Power Complex: Pollution on the Reservation*, 47 Ind. L. J. 704 (1972); Department of the Interior, Southwest Energy Study: Summary Report, pt. 9 (1972). *See also* Point VI *infra*.

[6]S. Rep. No. 92-1015, *supra* at 24.

Once again, we are observing what President Theodore Roosevelt decried when he vetoed a bill to allow a private company to construct a dam on the James River in 1909: "The great corporations are acting with foresight, singleness of purpose and vigor to control the water powers of the country, by trying to place themselves in a 'twilight zone' from any regulation."[7] Quoted in J. Kerwin, *supra* at 122.

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[7]The "twilight zone" mentioned by President Roosevelt has now become a "regulatory gap." *See* the discussion of Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) in Point VI *infra*.

III: CONGRESS DID NOT CONSIDER WHETHER STEAM PLANTS NEEDED TO BE REGULATED IN 1920 BECAUSE THEIR OPERATIONS HAD NO EFFECT ON THE HYDRO POTENTIAL OF NAVIGABLE STREAMS, BUT FUNDAMENTAL CHANGES IN THEIR METHOD OF OPERATIONS HAVE NOW BROUGHT STEAM PLANTS WITHIN THE RANGE OF EVILS CONGRESS SOUGHT TO REGULATE UNDER THE FEDERAL POWER ACT; UNDER THESE CIRCUMSTANCES, JURISDICTION SHOULD BE CONSTRUED EXPANSIVELY.

A. *The legislative history shows only that Congress was not thinking about steam plants, at all.*

So far, we have argued that a detailed analysis of the legislative history of the Federal Power Act is unnecessary because jurisdiction over steam plants is conferred by the literal language of the Act and is in harmony with one of its basic purposes. Therefore, this Court need look no further before concluding that the statute should be applied literally.

But even if this Court is persuaded that we must wade through the mass of legislative documents offered for our amusement and delectation, we find that at best they only support the inference that the 1920 Congress was not thinking about regulating the steam plants of that day. As we show later in this point, that was natural because steam plants were then irrelevant to the problem under consideration. With perhaps one exception, there is no evidence that Congress actually meant affirmatively to exclude steam

plants from jurisdiction forever, regardless of changes in circumstances.[1]

The Indian respondents agree with the government (Brief, p. 21) that the Federal Power Act, at the time of its enactment, would have appeared to be "directly" concerned with water power.[2] We also agree that on the rare occasions when the sponsors of the Act mentioned steam power at all, it was only in the context of comparing it with water power (App. 65a). But this is not the same as saying that Congress actively

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[1]The one direct reference to possible steam plant regulation cited by the petitioners is this dialogue at a committee hearing between Calvert Townley, a power company official, and Congressman Taylor of Colorado (government's Brief, pp. 21-22; power companies' Supplement to Brief, p. 43S):

> MR. TAYLOR. You have spoken about the handicaps that are against water power development as compared with steam. The steam plants are not subjected — or will not be subjected, generally speaking — to the governmental regulations that this bill provides for will they?
>
> MR. TOWNLEY. No, sir.
>
> MR. TAYLOR. And they will not be subjected either to the payment of Federal royalties?
>
> MR. TOWNLEY. No, sir.

Townley was one of the leading power company lobbyists. J. Kerwin, *supra* at 241. It would have been passing strange for him to give an expansive reading to the proposed Commission's jurisdiction in view of the power industry's long and bitter struggle against *any* regulation, at all. Taylor, too, was an opponent of federal regulation, and a champion of the policy of making water power dams as attractive as possible to private capital. *See* 51 Cong. Rec. 13680 *et seq.* (1914). Thus, we have here a gratuitous colloquy between two allies opposed to extensive regulation of power companies, who have seized the opportunity to spread their views on the record. There is no evidence that the full Congress knew of, much less approved of, these views. Because of the notorious susceptibility of Congressional hearings to propagandizing, the courts have wisely ruled that statements made at hearings "are without weight in the interpretation of a statute." McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 493-94 (1931).

[2]It is interesting to note that the same sentence quoted for this proposition goes on to express the view that a subsidiary purpose of the Federal Power Act was to achieve "a favorable and stabilizing effect *on the whole power industry*" (App. 67a) (emphasis added).

intended to limit FPC jurisdiction under all circumstances and forever to hydro plants. As we showed in Point I, the "plain meaning" rule establishes the presumption that unambiguous statutory language means what it says. To overcome that presumption, the petitioners must show that Congress affirmatively intended to exclude such jurisdiction.

To paraphrase the language of Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 644-45 (1819):

> It is not enough to say that this particular case was not in the mind of [Congress] . . . when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the [statute] in making it an exception.

See also Ozawa v. United States, 260 U.S. 178, 195 (1922).

B. *While steam plants in 1920 had no effect on waterways, new technology in the power industry has completely changed the situation.*

It is true, as the court below pointed out (App. 90a), that steam plants in 1920 supplied the bulk of the Nation's power and that those plants were water-cooled. But we submit it was wrong to infer on that basis that Congress intended not to include them within the FPC's jurisdiction because "any legislation intended to regulate comprehensively the interrelationship between the production of power and the efficient management of water resources would surely have taken account of the existence of these water-using steam plants" (App. 90a).

The fact is, however, there would have been no reason for Congress to consider regulating steam plants in 1920 to achieve this result. To all intents and purposes, steam power plants then had no effect on navigable waters. The largest steam plant then in existence was only 60 megawatts, and the total steam generating capacity *for the entire country* was only 8,900 megawatts. Together, the Nation's power plants used a total of 178 million gallons of water per day (App. 86a, n. 111), equivalent to about 199,000 acre feet of water per year.[3] This is less water than the six plants of the Southwest Energy Complex, *alone*, will use.[4]

Aside from the fact that 1920's power plants used so little water, the *way* in which they used it made for a minimal impact on waterways. For they returned virtually all their cooling water to the streams, so that it could be used again for other purposes, such as downstream hydro generation. Also, the steam power plants of those days had to be located near to their load centers, because ultra-high voltage transmission lines, which have since made long distance shipment of power possible, were then unknown. Thus, the imperceptible impact steam plants had on waterways was even further diluted because that impact tended to be spread out evenly across the Nation.

However, in the past decade a technological revolution has occurred in the power industry, which has led to the emergence of an entirely new phenomenon, the energy complex. This revolution was described by an official of the coal company that supplies the fuel to the Four Corners plant.[5] He

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[3]There are 325,851 gallons in an acre foot (the amount of water necessary to cover an area of one acre to a depth of one foot). Thus, the daily cooling water used by all power plants in 1920 was about 546 acre feet.

[4]The six plants will consume 250,000 acre feet of water per year (App. 52a).

[5]Testimony of Albert L. Reeves of Utah Construction & Mining Co., coal supplier for the Four Corners power plant, in *Hearings on Problems of Electrical Power Production in the Southwest Before the Senate Comm. on Interior and Insular Affairs*, 92nd Cong., 1st Sess., pt. 1, at 75 (Comm. Print 1971) (hereinafter "Southwest Power Plant Hearings").

commented on the "technological advances . . . based on the economics of scale" achieved by the power plants involved in this suit as a "major breakthrough" in the field of energy conversion. This major change was made possible by three new techniques: the development of new equipment that made strip mining of low-heat value Western coal economically feasible; the design of new types of generating units, much larger than any previously known; and the development of technology to transmit large amounts of electricity over long distances.

Now, several utilities, serving widely scattered load centers, can pool their resources to construct a handful of huge electric power plants at distant locations, convenient to sources of fuel and water. By means of an interconnected network of ultra-high voltage transmission lines, these few plants are able to supply a large percentage of the electricity demand of vast geographical areas.[6] This system results in substantial cost savings to the power companies and has the secondary advantage of shielding the appalling environmental impacts of the energy complex from their urban customers' consciousness. The trend toward clusters of giant power plant units is predicted to revolutionize the power industry. It is estimated that plants of 500 megawatts or more will probably account for 90 percent of the total steam generating capacity in the Nation by 1980.[7]

When several mammoth power stations are located in the same watershed, they can have an overwhelming impact on

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[6]A power company consultant estimated that five of the six plants involved in this suit would supply one-third of all electricity sold by the intervenors in 1980 at load centers that include Los Angeles, San Diego, Phoenix, Tucson, Las Vegas, Salt Lake City, and environs. *See* 1 Southwest Power Plant Hearings, *supra* at 65. For further details on the workings of an energy complex, *see* the testimony of the President of Public Service Company of New Mexico at 1 Southwest Power Plant Hearings, *supra* at 41.

[7]Ass'n of the Bar of the City of New York, *Electricity and the Environment: The Reform of Legal Institutions*, p. II-7 (1972).

the entire stream regimen. The six plants involved in this case will withdraw permanently up to a quarter million acre feet of water annually from the Colorado River system; as we noted above, this is more water than all the steam plants *in the entire country* used in 1920. The six plants are withdrawing more than 2 percent of the River's flow (App. 52a). Projected increases in generating capacity at these and other projected plant sites would raise that total to 5 percent (*Id.*).

The figures on steam plants' use of water nationwide stagger the imagination. As we noted above, in 1970, steam plants with a capacity of 298,000 megawatts (App. 86a, n. 110) used 120 billion gallons of cooling water a day, one-third of the total water used for all purposes (App. 86a, n. 111). By the end of the century, estimates are that steam power plants will use 600 billion gallons of water a day, equal to one-half the total daily runoff in the United States (App. 51a).

Besides the enormous increase in the quantity of water now used by steam plants, the *quality* of that usage has also changed, so as to add further to the impact of their operations on waterways. In arid areas like the Southwest, power plants usually evaporate all the cooling water they withdraw; none of it is returned to the stream. The reason for this is that the cooling process raises the salinity level of the cooling water substantially. In river systems such as the Colorado, where salinity is already a problem, any additional salt load would be intolerable. Therefore, power plants such as those in the Southwest Energy Complex permanently and substantially diminish the total volume of the River, and thus, the hydroelectric power potential at all downstream water power sites.

The net effect of these changes was pointed out by the court below (App. 86a-87a): "Giant complexes such as the Four Corners plant will withdraw (often permanently) such large amounts of water that the power potential of majority

[sic] waterways will be affected adversely *to an extent greater than that of hydroelectric facilities*" (emphasis added).

The legislative history adduced by the petitioners shows only that Congress was not thinking one way or the other about the question of whether steam plants should be licensed. Such a showing is not enough, under the test laid down by Chief Justice Marshall in the *Dartmouth College* case, to vary the plain meaning of the statute. The petitioners are also required to show that if someone had had the prescience to anticipate the development of the energy complex and had asked Congress if it meant to regulate its operations, Congress would have said "no." There is not a scrap of evidence to show such an intent; indeed, in view of Congress' expressed desire to curb the power companies' appetite for free public resources described at Point II, it is highly unlikely that Congress would have deliberately chosen to allow them to help themselves to the capacious feast they are now enjoying, while leaving the public to pick up the whole check.

Congress' failure to consider the need to license steam plants in 1920 was entirely understandable in the light of their miniscule effect on waterways at that time. But because of major technological changes in the power industry, unforeseeable at that time, the impact of steam plants on the Nation's waters is now highly significant. A broad reading of the statute is now required if Congress' aim to curb private power interests' capture of the public's water resource is to be achieved.

C. *The courts construe agencies' regulatory mandates broadly in order to effectuate Congressional policy under new conditions.*

The courts interpret jurisdictional statutes so that independent federal agencies responsible for regulating a significant portion of an industry's activities are given a broad

mandate to bring their regulatory practices into line as the times change.

As Sutherland has noted:

> Legislation is often written in terms which are broad enough to cover many situations which could not occur to mind at the time it is enacted. And so a statute, expressed in general terms and words of present or future tense, will be applied, not only to situations existing and known at the time of the enactment, but also prospectively to things and conditions that come into existence thereafter. 2A Sutherland, *Statutory Construction* § 32, p. 229 (4th ed. 1973).

See also Johnson v. United States, 163 Fed. 30, 32 (1st Cir. 1908) (Holmes, J.).

This Court agrees:

> The legislative process would . . . bog down if Congress were . . . required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules. . . . *American P. & L. Co. v. SEC*, 329 U.S. 90, 105 (1946).

See also Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941; *Carlson v. Landon*, 342 U.S. 524, 542 (1952) and cases cited *ibid.* at notes 36 and 37.

This Court, recognizing the fluid nature of the issues that concern regulatory agencies, such as the FPC, has often construed their statutory authority broadly, so as to take changed circumstances into account. Thus, in *American Trucking*

Ass'ns, Inc. v. United States, 344 U.S. 298 (1953), the issue was whether the Interstate Commerce Commission had exceeded its jurisdictional authority by promulgating regulations governing the use of leased equipment by licensed motor carriers.

It was argued that the words "regulation of leasing practices" were not found in the statute and, therefore, the ICC had no authority in this area. This Court held at 344 U.S. 309, 310:

> [We do not think] it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess. [citations omitted]

One important reason for construing agencies' jurisdiction broadly is that rapid strides in technology, such as the development of the energy complex, make previous limitations obsolete. For example, in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the question was whether the Federal Communications Commission could assume jurisdiction over cable television. This Court stated:

> Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished "to maintain, through

> appropriate administrative control, a grip on the dynamic aspects of radio transmission," that it conferred upon the Commission a "unified jurisdiction" and "broad authority." Thus, "[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." Congress in 1934 acted in a field that was demonstrably "both new and dynamic," and it therefore gave the Commission "a comprehensive mandate," with "not niggardly but expansive powers." 392 U.S. at 172-73. [citations and footnotes omitted]

In *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), the Supreme Court sustained the power of the FCC to issue regulations governing chain broadcasting. Although the statute establishing the FCC limited its jurisdiction to the licensing of individual broadcast stations, this Court approved the agency's regulatory scheme providing for comprehensive and detailed standards for operation of broadcasting networks. The basic standard articulated by the Court for determining the validity of Commission jurisdiction was whether the activity, if unregulated, could "frustrate the purposes for which the Communications Act of 1934 was brought into being. . . ." 319 U.S. at 219.

This Court conceded that the Communications Act of 1934 "does not explicitly say the Commission shall have power to deal with network practices found inimical to the public interest." "But," the opinion continued, "Congress was acting in a field of regulation which was both new and dynamic." The Court described the legislative setting of the 1934 Act, which was remarkably similar to that of the Federal Power Act: "Congress moved under the spur of a widespread fear

that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." And the Court concluded that Congress did not attempt "an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding." 319 U.S. at 219.

Indeed,

> [I]t is a general rule in the construction of statutes that legislative enactments in general and comprehensive terms, and prospective in operation, apply to persons, subjects, and businesses within their general purview and scope, though coming into existence after their passage, where the language fairly includes them. *Cain v. Bowlby*, 114 F.2d 519, 522 (10th Cir. 1940), *cert. denied*, 311 U.S. 710.

See also Newman v. Arthur, 109 U.S. 132, 138 (1883); *Pickhardt v. Merritt*, 132 U.S. 252 (1889).

The rule in *Cain v. Bowlby* has been applied in any number of situations. *See Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925), *cert. denied*, 269 U.S. 556 (copyright laws violated by playing tune on commercial radio without permission, even though radio not yet invented when Copyright Act adopted); *Bruce Transfer Co. v. Johnston*, 227 Iowa 50, 287 N.W. 278 (1939) (statute allowing suit against railroads, stages, and car lines held to apply to trucking, though internal combustion engine had not yet been invented at time statute was passed); *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N.W. 828 (1884) (statute authorizing incorporation of telegraph company also includes telephone company).

A turn-of-the-century New Hampshire opinion dealt with an earlier transition period in the power industry — a shift from the use of water, as a force to move milling and other machinery by direct mechanical means, to its use in the production of electricity. In *McMillan v. Noyes*, 75 N.H. 258, 72 Atl. 759 (1909), the question was whether a dam built to provide hydro power fell within the terms of a statute giving flowage rights to "a water mill, and a dam to raise the water for working it, and for creating a reservoir of water, and for equalizing the flow of the same. . . ." The court had no trouble concluding that a power plant fit within the definition of "water mill." We take the liberty of quoting the opinion at some length because it deals with so many of the contentions in this case:

> But it is said that the Power Company does not bring itself within the terms of the statute because it is not maintaining "a water mill" in connection with its dam. That it has erected a building, and installed the necessary machinery for the conversion of the water power secured by its dam into electric power, is conceded. The machinery is run by water power, and in the ordinary use of language the establishment might be termed a "water mill"; that is, a mill operated by water power. That the mill in question falls within the literal meaning of the statute is evident. It is argued, however, that the legislative purpose was to encourage the establishment of manufactories operated by water power, that a water mill is a structure where some useful article, or articles, is manufactured by machinery driven by water power, and that electric energy, though conserved for industrial purposes by the application of water power to intricate machinery, is not a manufactured product. If it is admitted that the present flowage act was passed, as its title indi-

cates, for the encouragement of manufactures, the question remains whether the accumulation of electricity for commercial use may not be deemed a manufactured product within the meaning of the statute. That electrical energy was not of much commercial importance 40 years ago, and was not one of the mechanical products which the Legislature then had in mind, is not conclusive evidence that it does not fall within the list of articles whose manufacture the Legislature intended to encourage. A holding that the Legislature intended to limit its encouragement to mill owners who manufactured such articles as were known and used previous to 1868 would plainly be an unreasonable construction of the act, not required by its language, and not supported by the public policy upon which it was based. 75 N.H. at 263-64, 72 Atl. at 762 [citations omitted].

. . . [T]he question here is . . . whether, upon a reasonable construction of the verbally unrestricted language used, in view of the general purposes of the act as applied to the present state of mechanical and scientific enterprises, the generation of electricity by machinery propelled by water power is such a manufacturing enterprise as the Legislature intended to encourage. A negative answer can only result by unreservedly adopting the so-called rule of strict construction, and imputing to the Legislature a purpose to restrict the operation of the act to ancient mills, like the old-fashioned gristmills and sawmills. But existing legislation of a general character, which is not specially restricted, must receive a construction based, in part at least, upon the present state of society, and not entirely upon the long-discarded customs in vogue at the time of its original enactment. To say

> that the only mills covered by the statute are grist-mills and sawmills because anciently there were no other mills or manufactories would be as absurd as to insist that a water mill means a mill run by a primitive water wheel. General legislation is intended to operate in futuro, and ordinarily to apply to new conditions caused by the progress of industrial enterprise. 75 N.H. at 265, 72 Atl. at 763.

The Indian respondents submit that a compelling analogy is offered by the decision in *United States v. Public Utilities Comm'n*, 345 U.S. 295 (1953). The main issue was whether the FPC had rate-making jurisdiction over sales in interstate commerce of hydroelectric power to the Navy and a California county, pursuant to Part II of the Federal Power Act. Section 201(a) of the Federal Power Act, 16 U.S.C. § 824, gives the FPC jurisdiction over interstate transmission and sale of electricity "to extend only to those matters which are not subject to regulation by the States." The utility claimed it was subject to rate-making supervision only by the California Public Utilities Commission, and not the FPC, pointing to § 20 of Part I of the Act, 16 U.S.C. § 813. That section allowed the FPC to set rates for interstate sales of power produced at licensed plants, if the state involved did not do so. Since California had endeavored to regulate rates in this case, the company argued, § 20 precluded Commission jurisdiction.

This Court rejected this reasoning. The Court conceded that Congress probably *did not*, in fact, intend to give the Commission authority to regulate such rates, because the way the power industry operated at that time was such that federal jurisdiction was unnecessary:

> Admittedly, § 20 contemplated state regulation. And it may well be, as indicated by the congressional hearings, that Congress quite frankly chose the local authorities to regulate the bulk of inter-

> state sales of electricity from licensed projects. In fact, a contrary view would have been almost astonishing as an historical proposition, for neither the large interstate operations of electric utilities that have developed during the last thirty years, nor the concomitant desirability of federal regulation, could have been foreseen in 1920. . . . So we may assume that Congress, as a policy judgment, accepted and adapted the substantial tradition of local utility regulation to power production licensed under the federal Act. 345 U.S. at 302-03.

However, the Court noted, Congress' assumption concerning the efficacy of state regulation was incorrect; this Court ruled a few years later that such regulation is an unconstitutional burden on interstate commerce. *Public Utilities Comm'n v Attleboro Steam & Elec. Co.*, 237 U.S. 83 (1927). Thus, § 20 "assumes what Attleboro held did not exist — state authority to reach interstate sales of energy for resale. . . ." 345 U.S. at 304. "But," the Court added, "there is no evidence that this was done with any firm intent to settle with the states a power essentially national." 345 U.S. at 303. The Court noted that the intent of Congress in enacting Part II was to "fill the gap" in rate regulation left by Attleboro, and that there was no hint that Congress intended to leave that gap wide open for licensed hydro power under § 20, but to shut it for power produced by steam generators or unlicensed hydro plants, which are not subject to the apparent exception of § 20.

This case, too, reveals a dangerous "gap," through which the Colorado River is flowing, unregulated, into the hands of the power companies. Here, too, the argument against jurisdiction is based primarily on a legislative history that shows Congress laboring under an assumption that is no longer true. But, as *United States v. Public Utilities Comm'n* shows, when supervening events (*e.g.*, changes in the law or

new developments in technology) prove that assumption invalid, this Court will not permit the power companies to evade regulation. Instead, it will apply the literal language of the statute, in order to effectuate the overall purpose.

The same reasoning was applied by this Court in *FPC v. Union Elec. Co.* (the *Taum Sauk* case), 381 U.S. 90 (1965). There, the issue was whether Congress had intended to subject to FPC licensing requirements only those power plants that had an effect on interstate commerce by navigation, or whether all hydro plants which affected interstate commerce in any way would be covered. The power company noted that the debates on the Federal Power Act were replete with lengthy arguments about navigability, but were silent on other aspects of the commerce power, such as the sale of electricity across state lines. This Court conceded this was true, speculating that the silence might have been due to two factors: the limited construction of the commerce power then prevailing under the rationale of *Hammer v. Dagenhart*, 247 U.S. 251 (1918) [overruled in *United States v. Darby*, 312 U.S. 100 (1941)]; and Congress' reluctance to "inject other constitutional issues into the ongoing debates." 381 U.S. at 105. The Court also noted that a lack of debate on this question was to be expected. The issue then was "largely theoretical," since, until the advent of the pumped storage plant, any hydro plants large enough to serve interstate markets would also have used enough water to affect the flow or level of downstream navigable waters. 381 U.S. at 105, n. 21.

"But," this Court concluded, "the Act which emerged from these debates . . . was couched in terms which reached beyond the control of navigation and forms no support for the proposition that Congress intended to equate the 'interests of commerce' with those of navigation." 381 U.S. at 105-06. Once again, the Court turned to the literal language of the statute to effectuate the broad purpose of Congress, despite legislative history indicating Congress might not have thought the

coverage of the statute needed to be that wide. The *Taum Sauk* case is discussed in more detail at Point IV-C, *infra*.

D. *The FPC has a broad mandate to integrate federal activities relating to the effects of power production on waterways.*

The court below conceded the "undeniable appeal" of this argument, but ruled that it "nonetheless fails" for two basic reasons: this Court's *dictum* to the contrary in *FPC v. Union Elec. Co.*, 381 U.S. 90 (1965) (discussed in Point IV), and the Court's conception of the limited role of the Federal Power Commission. The Court of Appeals declared that "the FPC does not have a broad, abstract mandate either to regulate the electric power industry or to engage in comprehensive planning for the utilization of our major waterways."

But this Court does not agree with this characterization; it has stated that the FPC is the agency which was given broad powers by Congress to put into effect "a general power policy" and to achieve "integration of federal activities affecting waterways." *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 167 (1953). Its "functions and powers," the Court continued, are "comparable to those of the Interstate Commerce Commission in the field of transportation." 345 U.S. at 168. The ICC does have the sort of wide-ranging powers to meet changing circumstances that, according to the opinion below, the FPC lacks:

> The stuff of the process of [rate making] is fluid and changing — the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. *Board of Trade v. United States*, 314 U.S. 534, 546 (1942).

It is true, as the court below points out, that the Federal Power Act does not authorize licensing for non-power related improvements, such as irrigation facilities (App. 89a). But no one is contending that such jurisdiction exists. We merely assert that the use of water from navigable streams *for the purpose of producing electric power* is licenseable.[6] As the court below acknowledged, the use of cooling water by steam plants is an integral part of the power production process itself, necessary to coax more power from the fuel burned:

> This cooling process is a matter not of convenience but of economic necessity. As the steam is exhausted into the condenser and cooled by the water, it condenses to liquid, thus occupying a smaller space than it did formerly and producing a partial vacuum. This vacuum at the exhaust of the turbine permits the entering high-pressure steam to undergo greater expansion, and hence deliver more energy to the turbine rotor, than if it expanded only to the pressure of the atmosphere. Roughly, the over-all efficiency of producing useful work from high-pressure steam can be in the 40 to 50 percent range if the exhaust steam is condensed by use of cooling water, whereas it will be only 30 to 40 percent if the turbine exhaust is directly to the atmosphere. . . . P. Cootner & O. Lof, *Water Demand for Steam Electric Generation* 8-9 (1965). Quoted at App. 91a-92a, n. 128.

The Indian respondents urge this Court to adopt the philosophy of Mr. Justice (then Judge) Holmes in *Johnson v. United States*, 163 Fed. 30, 32 (1st Cir. 1908):

> A statute may indicate or require as its justifica-

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[6] It is interesting to note that at least some Congressmen believed that coverage of the Power Act might extend far beyond this range. Senator Thomas: "[T]here is not a man in your State who can build a cow track or a sheep's bridge across one of your streams without coming down here to Washington. . . ." 59 Cong. Rec. 7733 (1920).

tion a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.

IV. NONE OF THE OTHER EXTRINSIC EVIDENCE COMPELS THE CONCLUSION THAT THE FPC LACKS JURISDICTION.

A. *The Commission's interpretation of the statute is not controlling.*

The court below (App. 74a-75a) and the petitioners (government's Brief, pp. 25-30; power companies' Brief, pp. 53-55) rely heavily on the FPC's construction of the statute. That interpretation should not govern here. First, and most important, this is a question of statutory construction, which has always been recognized as an area uniquely entrusted to the courts. Unlike administrative decisions involving technical facts or policy judgments, where the judicial branch properly defers to agency expertise, the courts do not hesitate to overrule erroneous interpretations of the law. *See Barlow v. Collins*, 397 U.S. 159, 166 (1970); *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 136 (1939); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 146 (1940); *NLRB v. Brown*, 380 U.S. 278, 292 (1965).

In *Volkswagenwerk v. Federal Maritime Comm'n*, 390 U.S. 261 (1968), this Court reversed a Maritime Commission ruling that it lacked jurisdiction, based on a narrow reading of its governing statute. Justice Stewart noted:

> . . . [T]he courts are the final authorities on issues of statutory construction . . . and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. . . . The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia. . . ." 390 U.S. at 272. [citations omitted]

The fact that the agency arrived at its erroneous conclusion early on and has clung to it through the years does not thereby convert its previous incorrect interpretation into an accurate statement of the law which binds the courts. "Consistent error is still error." *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678, n. 5 (1954); *see Nantahala Power & Light Co. v. FPC*, 384 F.2d 200, 206, n. 12 (4th Cir. 1967), *cert. denied*, 390 U.S. 945. In the *Nantahala* case, the appellant pointed out that the FPC had consistently supported its position in its First Annual Report, a 1923 decision, a statement by its chief counsel in another annual report, and Congressional testimony by its solicitor and general counsel. The court observed, "more significant, more precise and more authoritative than the observations of the Commission and its employees is the unadorned language of the Act." 384 F.2d at 206.

A host of other cases apply the general rule that administrative construction of a statute must yield to the plain language and overall scheme. *See American Ship Building Co. v NLRB*, 380 U.S. 300, 316 (1965); *County of Marin v. United States*, 356 U.S. 412, 420 (1958); *United States v. DuPont De Nemours & Co.*, 353 U.S. 586, 590 (1957); *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 74 (1953); *Zuber v. Allen*, 396 U.S. 168, 192-93 (1969).

The Commission's protestations that it lacks jurisdiction over steam plants all were asserted in a non-adversary context in its annual reports, testimony before Congress, and in a formal decision in which no one contended that licensing was required (*see* government's Brief, pp. 25-28). This Court has held that non-adversary determinations do not have the force of law. *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 290 (1946). This principle applies in general to "uncontested administrative construction" (*SEC v. Sterling Precision Corp.*, 393 F.2d 214 (2d Cir. 1968)) and to the FPC in particular. *Safe Harbor Water Power Corp. v.*

FPC, 124 F.2d 800 (3rd Cir. 1941), *cert. denied*, 316 U.S. 663.

Another factor which might have lent authority to the Commission's interpretation is lacking in this case, contrary to the assertion of the court below. The Court of Appeals quoted this Court for the proposition that administrative construction is entitled to particular respect when it "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Power Reactor Dev. Co. v. Electrical Union*, 367 U.S. 396, 408 (1961), quoted at App. 76a. Such a contemporaneous construction "carries most weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings." *Zuber v. Allen*, 396 U.S. 168, 192 (1969). The court below apparently assumed that the First Annual Report by the FPC actually was such a "contemporaneous construction" by the first commissioners. This is not the case. The First Annual Report was put out by the *second* Federal Power Commission, made up of members of the newly-elected Harding Administration. Not only had these men not been instrumental in passing the Federal Power Act, but they were actively opposed to governmental curbs on the private power industry.

The campaign to enact the Federal Water Power Act was a highly partisan struggle between two opposing coalitions. One group consisted primarily of the power companies and other industrial spokesmen, allied with Western legislators who wanted to protect the states' control of water rights against any federal encroachment. The leaders of this group were frequently heard to argue that water power development must be made attractive to private capital and therefore government interference with the profit-making potential of the industry should be held to a minimum. They also often pro-

claimed their belief that the government had no property interest in the waters of navigable streams, and therefore was not entitled to charge for its use. Their eagerness to promote water power development (which had so far been stymied by cumbersome and conflicting statutory requirements) caused them ultimately to acquiesce in the enactment of legislation creating the Federal Power Commission, in order to move the situation off dead center. But at every turn, they pushed for the narrowest possible range of federal jurisdiction and control.

On the other side were the early conservationists and opponents of big business monopolistic tendencies, the erstwhile "trust busters." They also wished to see water power development go forward, but were determined to make sure that the government, in the course of encouraging private capital to develop natural resources, presumably for the public's benefit, did not surrender the public's property to a few wealthy entrepreneurs. These men recalled the gross abuses of the government's giveaway of millions of acres in railroad land grants and coal leases; they were determined that the public's interest in the power potential in navigable streams and the comprehensive development of its waterways would not share a similar fate. Thus, they battled for tight federal supervision over the location and timing of private water power developments, as well as provisions to assure adequate monetary protection for the public by way of annual charges, regulation of rates, and other financial aspects, and the ultimate possibility of recapture of the power site by the government.

The conservationist forces were spearheaded by members of the Wilson Administration and that wing of the Republican Party which had been associated with the Progressive movement of Theodore Roosevelt. The three Cabinet officers who were to make up the first Commission were among the most enthusiastic and skillful supporters of the legislation; they participated extensively in the drafting process. *See* the letters

quoted by the court below at App. 66a-70a, n. 62;[1] J. Kerwin, *supra*, Chap. V. But these men served as commissioners for less than a year. They were swept out of office by the Harding victory of 1920. The officials who replaced these conservationists had diametrically opposing views on the need to rein in the power companies. The leading historian on this subject describes the situation as follows:

> Clearly, the ascendency of the Republican Party during the 1920's tended to weaken the FPC. Essentially opposed to federal regulation, the dominant Republican philosophy was sympathetic to the position of the large power corporations. Albert B. Fall, W. M. Jardine, Hubert Work, John W. Weeks, Patrick J. Hurley, and Ray Lyman Wilbur, all of whom served on the FPC during the 1920's, were conservatives who desired above all to help, not hinder, private power. Under their benevolent direction, the Power Commission became an innocuous service agency, not a regulatory board. D. Swain, *Federal Conservation Policy, 1921-1933* 114 (1963).

Congressman Frank E. Smith of Mississippi, the eminent historian of conservation politics, agrees:

> Throughout the 1920's the federal interest in hydroelectric power development was supposedly under the protection of the Federal Power Commission, the cabinet agency created in 1920. Most of the Cabinet members who served on the commission during this period of its existence were frankly sympathetic to private power interests whenever

[1]Until 1930, when the Federal Power Act was amended so as to make the FPC an independent agency, the Commission was made up of the Secretaries of War, Interior and Agriculture. *See* 41 Stat. 1063 (1920), amended 46 Stat. 797 (1930). (Franklin K. Lane, one of the signers of the letter quoted, was replaced as Interior Secretary by John P. Payne, another conservationist, who actually sat on the FPC.)

> they opposed public power development. The commission exercised no powers of regulation, and probably would have been an outright service agency of the power companies but for the integrity of its secretary, O. C. Merrill. F. Smith, *The Politics of Conservation* 171 (1966).

These were the men who signed the Commission's First Annual Report. To rely on their views as to what the previous conservationist Congress had in mind is akin to asking a fox to help design a burglar alarm system for a henhouse.

As to the *consistency* of the Commission's views, the Indian respondents submit that it actually constitutes bureaucratic inertia, more than anything else. Virtually all the Commission's disclaimers of jurisdiction cited by the government (Brief, p. 26, n. 24) are one-line reassertions of the original Annual Report's conclusion. Stripped of its gaudy plumage of "contemporaneous construction," the Commission's original disclaimer is left to stand on its own merits, which are somewhat less than spectacular. The entire subject of this litigation, FPC jurisdiction over steam plants, which produced an opinion below of more than 70 pages in the Court of Appeals (App. 38a-112a), was disposed of in three declarative sentences (*see* government's Brief, p. 25) without one word of analysis, nor a single supporting authority. One searches in vain for even a hint of the reasoning process which led to this determination. The courts look with deep suspicion on legal opinions which offer "nothing to support the conclusion but the conclusion itself." *D.C. Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1243 (D.C. Cir. 1972), *cert. denied*, 405 U.S. 1030; *cf. Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

The court below deduced that the Commission's interpretation had received a legislative imprimatur because it had been transmitted to Congress, and there were no complaints from the legislators (App. 76a-77a). *See also* government's

Brief, pp. 26-30. The government also alluded to the fact that the Commission has asked Congress for jurisdiction, but again, no action was taken (Brief, p. 27).

A similar "ratification-by-silence" argument was rejected in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). In that case, the Immigration Service contended that its hearings in deportation cases were not subject to the Administrative Procedure Act. The Service had submitted legislation specifically seeking exemption from the A.P.A. to Congress, but it was not passed. It argued that Congress was therefore aware of the Service's contention, and the fact that it had taken no action disagreeing with that contention made it "at least arguable that Congress was prepared to specifically confirm the administrative construction by clarifying legislation." The Court disposed of this argument in short order: "We do not think we can draw that inference from incompleted steps in the legislative process." 399 U.S. at 47. *See also Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940), in which the Court said, "To explain the cause of nonaction by Congress when Congress itself sheds no light is to venture into speculative unrealities."

And, as this Court observed in *American Trucking Ass'ns, Inc. v. A. T. & S. F. Ry.*, 387 U.S. 397, 418 (1967):

> The advocacy of legislation by an administrative agency — and even the assertion of the need for it to accomplish a desired result — is an unsure and unreliable, and not a highly desirable, guide to statutory construction. The possibility of its use to prove more than it means may, but should not, deter administrative agencies from seeking helpful clarification of authority or a fresh and specific congressional mandate.

See also United States v. United Mine Workers of America, 330 U.S. 258, 281-82 (1947); *United States v. Price*, 361

U.S. 304, 312 (1960); *Rainwater v. United States*, 356 U.S. 590, 593 (1958).

B. *The Taum Sauk case.*

The court below (App. 80a-83a, *see* especially 88a), the government (Brief, pp. 30-35), and the power companies (Brief, pp. 52-53) lean heavily on this Court's dictum in *FPC v. Union Elec. Co.*, 381 U.S. 90 (1965) (the *Taum Sauk* case), to the effect that the Commission has no jurisdiction over steam plants. The general rule is that dicta in previous opinions does not bind this Court. *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972). The peculiar circumstances of the *Taum Sauk* case suggest even more strongly than usual that this rule should govern in this case.

Taum Sauk, of course, did not involve a steam plant at all, but a pumped storage plant, which is concededly a hydroelectric facility, although it does possess some of the important attributes of a steam plan (*see p. 12 supra*). Steam plants were drawn into the discussion for this reason: the power company argued that the Commission did not have to apply for a license for the Taum Sauk plant because it was located on a non-navigable headwater of a navigable stream, and would have no effect on interstate commerce by water or navigation. Congress intended to invoke only its power over commerce in navigable waters, and not its plenary power over interstate commerce, in the Federal Power Act, the company asserted. Therefore, the company reasoned, since its facility would have no effect on water commerce, it was not subject to the licensing requirement of 16 U.S.C. § 797(e). This Court rejected this argument, finding that the language of the statute, together with the discerned "breadth of the federal interest in hydroelectric projects expressed in the 1920 act," compelled the conclusion that "the preoccupation of the Commission and the [Congressional] committees with navigation, while not without significance, does not overcome the clear

import of the language and the purposes of the Act." 381 U.S. at 109.

If FPC jurisdiction were held to extend to its pumped storage project on a non-navigable stream, argued the power company, an "anomalous consequence" would result. It would mean that steam plants would also be licenseable because they, like pumped storage plants, generate electricity for sale in interstate commerce, and there would be no logical basis for distinguishing between the two types of plants. But since everyone, most notably including the FPC, the adverse party in the litigation, assumed that steam plants are *not* licenseable, the Commission's jurisdiction must rest on the narrow navigation power, rather than the broader interstate commerce power.

This Court found its way out of the "conundrum" by emphasizing that Part I of the Federal Power Act

> . . . is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission. 381 U.S. at 110.

As the Indian respondents showed above in Points II and III, this distinction is *not* obvious and meaningful, because steam plants, such as those in the Southwest Energy Complex, "will withdraw (often permanently) such large amounts of water that the 'power potential' of majority [sic] waterways will be affected adversely to an extent greater than that of hydroelectric facilities" (App. 87a). This Court proceeded on the incorrect assumption that steam plants do not affect waterways in *Taum Sauk*, because none of the parties had any reason to apprise it of the facts discussed in this brief — the power company, the government, and the court below had

all assumed the lack of FPC jurisdiction over steam plants. As indicated above (Point IV-B), determinations (or in this case assumptions) that are non-adversary in nature do not have the force of law. When important facts were not brought to the Court's attention in a previous case, its holding is not controlling in any subsequent litigation. *Great Northern Ry. v. United States*, 315 U.S. 262, 279 (1942).

We agree with the government that the *Taum Sauk* language does not foreclose "further consideration of the issue presented here," but emphatically disagree with its assertion that its reasoning "warrants at least substantial weight in deciding the present case" (Brief, p. 35). That language is mere dictum, announced by this Court in a non-adversary setting without the benefit of an exposition on the crucial facts brought out in this case. The Indian respondents are entitled to a full day in court on their claim; we urge this Court to consider it now on its merits.

C. *The title and preamble to the Federal Power Act.*

It is argued that the original title and the preamble to the Act show that steam plants were not to be regulated (App. 72a-73a; government's Brief, pp. 16-17). The Act was originally entitled "the Federal *Water Power* Act" and the preamble denotes the statute as: "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal [a previous act], and for other purposes" (41 Stat. 1063).

In general, titles are of little value in statutory construction. In *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519 (1947), the railroad sought to base its restrictive reading of a statute on its title. The Court rejected its argument as follows:

> That the heading . . . fails to refer to all the matters which the framers of that section wrote into the

> text is not an unusual fact. . . . Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner. . . . As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. 331 U.S. at 528-29.

It is obvious that the Federal Power Act does far more than create a commission, provide for the improvement of navigation and development of water power and related uses of public land and accomplish a repeal — the only subjects mentioned in its title. Among other things, the Act gives the Commission authority to conduct investigations on various aspects of power production and transmission (§ § 4(a) and (g)). It outlaws combinations and agreements to restrain trade or fix prices (§ 10). It authorizes the Commission to regulate licensees' rates, service, and issuance of stock under certain situations (§ 20). It grants the power of eminent domain to licensees (§ 21), and confers jurisdiction on district courts to hear license revocation proceedings (§ 26). The Act's preamble, of course, does not refer to all these matters and could not be expected to do so. "[T]o attempt to refer to each specific provision would often be ungainly as well as useless." *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519 at 528 (1947).

These diverse features of the Act, as well as the Commission's incipient authority to license steam plants on navigable streams, are subsumed under the broadly-inclusive last three words of the title, "for other purposes." Words such as these have been read broadly by the courts. *See, e.g., Caminetti v. United States*, 242 U.S. 470, 489 (1917); *Pike v. United States*, 340 F.2d 487, 489 (9th Cir. 1965).

The government acknowledges the validity of this principle, but seeks to escape its force by citing, out of context, additional language in the *R.R. Trainmen* case for the proposition that the title and preamble may still be used as "tools" to vary the plain meaning of the statutory text. The full text reads:

> For interpretative purposes, they [titles] are of use *only when they shed light on some ambiguous word or phrase*. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain. 331 U.S. at 529 (emphasis added).

Again, the "plain meaning" rule governs.

V. THE COURT BELOW CORRECTLY RULED THAT THE SIX PLANTS ARE SUBJECT TO FPC JURISDICTION UNDER THE SURPLUS WATER CLAUSE.

The court below ruled that the six plants are subject to the jurisdiction of the FPC because they were "utilizing the surplus water or water power from any Government dam." It expressed its belief that this clause, in contradistinction to the "project works" clause, "does indeed mean what it says" (App. 101a). This belief was fostered by two factors. The first was the actual language employed in the clause:

> Initially, it should be observed that the "surplus water" clause does not refer to the licensing of "project works" as does the "constructing, operating, and maintaining" clause. The words "project works" in the latter clause follow the words "for the purpose of," and they are not found at all in the "surplus water" clause even though that clause is introduced by a second "for the purpose of." By their terms, then, the two licensing provisions of § 4(e) encompass different activities, and it does not follow that the limitation of the reach of the "constructing, operating, and maintaining" clause of hydroelectric projects requires reading a similar limitation into the language of the "surplus water" clause. App. 100a-101a.

The second factor was that, unlike the situation with respect to the "project works" clause, the court found little relevant extrinsic evidence on the meaning of the surplus water clause. But what little it found, principally statutes and court cases, evidenced a governmental desire to control both water and water power produced at governmental projects.

The government and the power companies disagree with that conclusion, maintaining that the legislative history

which, they claim, shows Congress' intent not to license steam plants under the "project works" clause is equally relevant to construction of the "surplus water" clause. In addition, the power companies contend, the legislative history indicates that Congress believed that the term "surplus water or water power" really was a synonym for "surplus power." The Indian respondents have already addressed the first proposition in Points II through IV. In this point, we confine our discussion strictly to the surplus water clause.

A. *The construction urged by the petitioners would render the surplus water clause nugatory.*

The government (Brief, pp. 44-50) and the power companies (Supplement to Brief, p. 2S and *passim*) contend that "surplus water or water power" must mean the same thing as "surplus power," because only the use of water from a government dam for the purpose of generating hydro power is covered by the surplus water clause. This proposition, in addition to violating common sense, transgresses against several canons of statutory construction. The most important of these was expressed by this Court in *United States v. Menasche*, 348 U.S. 528, 538-539 (1955): "It is our duty 'to give effect, if possible, to every clause and word of a statute,' [citation] rather than to emasculate an entire section as the Government's interpretation requires." In *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879), Mr. Justice Strong called this a "cardinal rule of statutory construction." *See also United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 410 (1914).

But if the meaning of the surplus water clause is restricted solely to the licensing of the use of water power from a government dam, there would be created a double surplusage in the statutory language. First, the words "water and" before "water power" would be rendered meaningless, because the only use to be licensed, the development of hydroelectric power, would already be covered by the term "water power."

The Commission, itself, has recognized that surplus water and surplus water power do not mean the same thing. In *California Oregon Power Co.*, 13 F.P.C. 1 (1954), the Secretary of the Interior contended (as the government claims in this case, *see* Point VII) that authority given to him under the reclamation laws of 1906 and 1939 to grant power privileges at government dams superseded FPC jurisdiction at those dams. The Commission observed:

> . . . The 1906 and 1939 Acts authorize the Secretary to lease "surplus power" or "power privilege." These Acts seemingly relate to the sale of electric power or the lease of water power including head and water, but not to the sale or lease of water as such. Where there is available stored water not to be used in irrigation, which represents storage over and above that needed for irrigation, and which would otherwise flow unused down the main channel of the stream, that water is "surplus water," and, if used for power development, would require a license from this Commission. Thus there is a distinction to be drawn between "surplus power" or "power privilege" in the reclamation laws, and "surplus water" from a Government dam as used in the Federal Power Act; and we are here concerned with surplus water only. 13 F.P.C. at 4.

Second, the petitioners' narrow construction would render the whole surplus water clause redundant. Under their reading, every facility that would be covered under the surplus water clause would *already* be subject to jurisdiction under the "project works" clause. The surplus water clause would therefore add no new subject of jurisdiction. The government attempts to counter this compelling argument by hypothesizing a theoretical situation where the surplus water clause applies but the project works clause does not. It concedes

that any hydro plant located on a navigable stream or on the headwater of a navigable stream which affects downstream navigability would be subject to regulation under the project works clause. *See FPC v. Union Elec. Co.*, 381 U.S. 90, 93 (1965); *Central Maine Power Co. v. FPC*, 345 F.2d 875 (1st Cir. 1965); *Nantahala Power & Light Co. v. FPC*, 384 F.2d 200 (4th Cir. 1967), *cert. denied*, 390 U.S. 945. Project works with no effects on navigation still must be licensed if located on federal lands. *FPC v. Oregon*, 349 U.S. 435 (1955). Furthermore, the *Union Electric* case held that the Commission had "project works" jurisdiction over hydro plants which, though their operations had no effect on navigability, produced power which is ultimately shipped in interstate commerce. The government then is left only with one possible category of hydro plant that would not otherwise be jurisdictional under the project works clause: "a hydroelectric facility located on a non-navigable waterway, on private land, generating electricity solely for intrastate transmission, and in no other way affecting commerce, would require a license if, but only if, it were using surplus water from a federal dam" (government's Brief, p. 58).

While ingenious, this theory is lacking in one important respect — there were no such facilities in 1920 and, to the best of our knowledge, there still are none today. This is so because the federal government would have no constitutional basis for erecting a dam on such a stream, since by definition, neither its power over navigable waters nor its authority to regulate interstate commerce can be invoked. As the law was understood in 1920 (and as it may well be today), the power of the federal government to construct dams was based exclusively on its authority over navigable waters. *See, e.g., United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 72-73 (1913), in which this Court found that since the primary purpose of a government dam was the "legitimate" one of improving navigation, the secondary aim of producing and selling water was permissible. *See generally* 2

Waters and Water Rights 5-15 (Clark ed. 1967); *cf. United States v. Grand River Dam Authority*, 363 U.S. 229 (1960). All statutes authorizing federal dams at that time contained at least "a perfunctory reference to navigation as the basis of the specific project." 2 *Water and Water Rights, supra* at 14. The tie-in between federal water projects and the navigation power was considered so fundamental that federal dams were denoted "navigation dams" in some of the forerunners of the Federal Power Act. *See, e.g.*, 57 Cong. Rec. 4632, 4635 (1919), 56 Cong. Rec. 9912, 9913 (1918). Indeed, the power companies recognize the perceived need at the time the Federal Power Act was debated to use navigation as a "jurisdictional peg" to exercise control over water resources (Supplement to Brief, p. 11S).

The government does not point to a single instance of a government dam built before 1920 that was not constructed, at least ostensibly, to aid navigation; we suggest no such example exists. Therefore, its effort to find an application for the surplus water clause which applies solely to hydro (as opposed to steam) plants that would not otherwise be covered by the project works clause fails. The surplus water clause can have independent significance only if construed to cover facilities other than hydro plants.

B. *There is no evidence that Congress intended to give the surplus water clause any construction other than its ordinary meaning.*

In Point I, we discussed the "plain meaning" rule, under which the courts look to the literal language rather than extrinsic sources to construe a statute. In general, the "plain meaning" is to be determined from "the popular or received import of words." *Maillard v. Lawrence*, 57 U.S. (16 How.) 251, 261 (1853). *See also Eyster v. Centennial Bd. of Finance*, 94 U.S. 500, 503 (1877). The courts will not accept a construction that requires a "reading of the words of the

statute in a strained or unnatural sense." *Woolford Realty Co. v. Rose*, 286 U.S. 319, 327 (1932).

To read the words "surplus water or water power" to exclude water and mean only power, we submit, is to bring this case within the reach of *Woolford Realty* — "The metamorphosis is too great to be viewed without a shock." 286 U.S. at 327. The construction urged by the petitioners constitutes a "curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925).

The petitioners base this rather amazing bit of statutory construction on legislative history which, they claim, shows that Congress used the terms "surplus water" and "surplus power" interchangeably. Once again, the Indian respondents point out that legislative history may not be used to vary unambiguous statutory language. This elementary principle has received "consistent adherence" from this Court. *Ex parte Collett*, 337 U.S. 55, 61 (1949). It is especially applicable here, where the purported thrust of the legislative history would do such violence to the statutory language. The surplus water clause "plainly, unambiguously and unequivocally"[1] requires the licensing of water, as well as power. The petitioners ask this Court to look at the legislative history which, they claim, shows that the clause nevertheless is ambiguous and that Congress did not wish the statute to mean what it says. "An inaccurate allegation of ambiguity does not justify the use of legislative history to vary the meaning of clear and unambiguous statutory language." *Montgomery Charter Serv. v. Washington Metro. Area Transit Comm'n*, 325 F.2d 230, 233 (D.C. Cir. 1963).

In any event, that history does not show that Congress failed to recognize the difference between "surplus water"

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[1]Montgomery Charter Serv. v. Washington Metro. Area Transit Comm'n, 325 F.2d 230, 232 (D.C. Cir. 1963).

and "surplus power." A quick look at the language of the various enactments cited in the power companies' Supplement to Brief reveals that, though the two terms often appeared in conjunction, they were never used synonymously. The early statutes cited at pp. 2S-8S all lease the water power that could be derived from the head created by a government dam. They use the term "surplus water" only to measure the quantity of water that could be allocated for this purpose — that quantity not needed to maintain the navigable capacity of the stream. The statutes did not purport to be leasing surplus water. Thus, the bills did not use the terms "water" and "water power" interchangeably.

But even if one disagrees with this conclusion, there is no evidence that Congress referred to these bills at all while drafting the Federal Power Act, much less that the legislature adopted and approved of the purported synonymous usage of the two terms. The bills dealt with leasing power, rather than the regulation of uses of surplus water, as did the Federal Power Act. If we are required to surmise as to possible statutory antecedents of the surplus water clause, it is more logical to look to early statutes in which Congress dealt directly with "surplus water." The first such usage we have found is in the Desert Lands Act of 1877, 43 U.S.C. § 321. That Act authorized reclamation of desert lands by conducting water to them, but reserved for continued public use "all surplus water" over and above that actually used for irrigation and reclamation. It is significant to note that the term "surplus water" had found its way into the statute books well before hydroelectric power was invented.[2]

Congress continued to give "surplus water" its normal meaning in a series of statutes. The most significant of these are codified at 43 U.S.C. § § 521-522. In 1906, Congress

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[2]The first, rudimentary direct current hydroelectric facility was not constructed until 1882, while the first dam exclusively for the production of hydroelectric power was built in 1894. 14 *Encyclopedia Americana* 646 (1972).

authorized the Secretary of the Interior to lease any "surplus power or power privilege at any dam built under the reclamation act for up to ten years." Act of April 16, 1906, c. 1631 § 5, 34 Stat. 117 (1906), 16 U.S.C. § 522. The same Congress that passed the Federal Water Power Act of 1920 indicated clearly that it did not believe that "surplus water" meant the same thing as "surplus power." It concluded that a separate statute, this time authorizing the Secretary to sell *water* not needed for irrigation, was required. Act of February 25, 1920, c. 86, 41 Stat. 451, 43 U.S.C. § 421.

There are other statutes in which the term "surplus water" appears and cannot possibly be taken to include power, as well. *See* 33 U.S.C § 708 (Secretary of the Army may sell surplus water from flood control reservoirs for domestic and industrial uses); 43 U.S.C. § 423 (Secretary of the Interior authorized to rent surplus water temporarily unnecessary for irrigation of lands inside a reclamation project for use on lands excluded from the project as "permanently unproductive").

The Indian respondents submit that it is somewhat chimerical to attempt to ascertain Congress' construction of langauge it uses in a statute by examining previous statutes employing the same words. But if one engages in this exercise here, one finds that the statutes cited by the power companies do not at all support their view, while those we have cited clearly show that "water" and "water power" have never been deemed to have identical meanings.

The two bills discussed at pp. 8S and 9S of the power companies' Supplement to Brief were never enacted and so are entitled to little weight. Furthermore, the language in the Act of August 22, 1911, ch. 41, 37 Stat. 32, allowing persons to convert "the power created with the surplus water not needed for lockage . . ." does not support the inference that power and water are the same. Indeed, it recognizes that power is created *with* the water. The bill introduced by Sen-

ator Jones, described at Supplement, p. 9S, contains neither the words "surplus water" nor "surplus power" and so, is not helpful.

The Adamson bill, H.R. 16053, introduced in 1914, is discussed at the Supplement, pp. 10S-22S. Although it is described as a forerunner of the Federal Water Power Act, it does not furnish a reliable guide to Congress' intent concerning the "surplus water" clause that ultimately emerged as § 4(e) of the Federal Water Power Act. The bill was vigorously opposed by conservationists as one "much more favorable to the water-power interests than to the public interest." Gifford Pinchot, quoted in J. Kerwin, *supra* at 181. It contemplated *leasing* of water power developed by surplus water, only. It did not purport to *regulate* any use of water, as did § 4(e) of the 1920 Act. Thus, it was natural that legislators, in discussing the bill, spoke only of the use of water in connection with production of hydro power, and not any other use. The bill was not designed to deal with water resources in any connection other than hydro power, at all. The concept of water resource planning was not introduced until later in the series of bills that ultimately led to the Federal Power Act. The same may be said about the bills introduced in the 64th Congress (discussed at Supplement, pp. 29S-36S) — they were designed only to implement a procedure to lease power from government dams, not to regulate and coordinate water power development.

But the Federal Water Power Act, as it finally emerged, incorporated a large policy change (leasing was supplanted by regulation) and a whole new concept — multiple purpose water resource planning — had been added. This concept was the central theme of a 1917 act creating a Waterways Commission which was to gather information and formulate "a comprehensive plan or plans for the development of waterways and the water resources of the United States for the purpose of navigation and *for every useful purpose*" (empha-

sis added). Act of August 8, 1917, ch. 49, 40 Stat. 250, 269. Because of the exigencies of the First World War, the Waterways Commission members were never appointed. Instead, the FPC took over its water resource planning functions. This is clear from the Congressional debates. Rep. Humphries, an opponent of federal regulation, proposed that the regulatory authority of the Power Act be given to the Waterways Commission. Rep. Esch, a member of the water-power committee that had reported out the House version of the bill, did not believe the moribund Waterways Commission should do the job and noted the advantages of having men of cabinet rank on the Commission. He pointed out that the FPC, too, would be able to make investigations necessary for water basin planning: "Therefore [the Federal Power] Commission would do the work which was to have been done by the Waterways Commission, but the giving of the power prescribed in this bill makes it less necessary for us to create the personnel of the Waterways Commission." 59 Cong. Rec. 9658 (1920).

That multiple use water resource planning is an important part of the Federal Power Act may be seen by the language Congress inserted into and deleted from the Act. First, it emphasized that the Commission was to consider other water uses besides power in § 10(a) of the Federal Power Act, 16 U.S.C. § 803(a). A project must be best adapted to "a comprehensive plan for improving or developing a waterway . . . for the improvement and utilization of water-power development, *and for other beneficial public uses, including recreational purposes* . . ." (emphasis supplied). Second, it substituted the term "government dam" for "navigation dam" in the surplus water clause in order to make clear that all water uses at government dams, not merely navigation, would be included in the Act's coverage. *See* Supplement to Brief, p. 50S.

Third, and most important, was the change from "surplus water *and* water power" to "surplus water *or* water power" in

the statutory language. The power companies admit that "it is not clear why this change was made . . ." (Supplement, p. 39S). The Indian respondents submit that it is logical to assume that Congress deliberately altered the statutory language from the conjunctive to the disjunctive to emphasize that two different things were being regulated — the use of either surplus power *or* surplus water.

We do not believe it would be useful to enter into an analysis and refutation of all the voluminous legislative material presented by the power companies. Not one word of it deals with the issue in this case — whether Congress intended to regulate the use by steam plants of cooling water from government dams. Taken in its most favorable light, it merely shows that some of the predecessor statutes to the Federal Power Act might have restricted the meaning of "surplus water" to surplus water used for hydroelectric purposes in the context of a federal leasing scheme. But the Act as finally adopted was a *regulatory* statute encompassing a broad range of water resource planning objectives not included in the previous leasing statutes. There is ample evidence that the words "surplus water" had a well-established legal significance, independent of "water power," and that Congress was aware of this meaning when it chose to differentiate "surplus water" from "water power" in the statute. All three judges in the court below concluded there is no "useful" legislative history, but that what little extrinsic evidence there is tended to confirm the literal interpretation of the statute (App. 101a).

We submit that the legislative history is therefore ambiguous. Under these circumstances, this Court must "look primarily to the statutes themselves to find the legislative intent." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413, n. 29 (1971). *See also NLRB v. Plasterers' Local Union*, 404 U.S. 116, 128-29 (1971). And, as we have shown above, the literal language of the statute incontrovertibly covers the six plants in this case.

VI. PUBLIC POLICY CONSIDERATIONS SUPPORT FEDERAL POWER COMMISSION JURISDICTION.

As the Indian respondents pointed out in Point III, the Federal Power Act is designed to protect the public interest by means of a comprehensive regulatory scheme. Because of the narrow construction of the statute adopted by the Commission, that interest is being neglected. The six plants involved in this case are a prototypical environmental nightmare. The public clamor they caused prompted the Senate Interior Committee to conduct five days of field hearings in 1971. During those hearings, a New Mexico Senator described the Southwest power complex as producing "unprecedented pollution";[1] the Supervisor of the New Mexico Air Quality Control Program indicated New Mexico citizens were "aroused" by excessive emissions from the Four Corners plant and that his agency would "hold the company's feet to the fire" to meet new, stricter air pollution standards;[2] the director of the Air Pollution Division of the Clark County, Nevada District Health Department announced that the Mohave plant "was constructed without adequate consideration of the potential effects of its emission . . ." and did not comply with local air pollution regulations;[3] the governor of Utah indicated that his state would "unequivocally" turn down any new power plant, despite the great need for additional income there, if its emissions equalled those at the Four Corners plant;[4] and a member of the Colorado Air Pollution Control Commission indicated that air pollution associated

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[1] *Hearings on Problems of Electrical Power Production in the Southwest Before the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess., pt. 1, at 5 (Comm. Print 1971) (hereinafter "Southwest Power Plant Hearings").

[2] 1 Southwest Power Plant Hearings, *supra* at 27.

[3] 2 Southwest Power Plant Hearings, *supra* at 768, 769.

[4] 3 Southwest Power Plant Hearings, *supra* at 892.

with the Southwest Energy Complex, even with controls, is "especially dangerous to health."[5]

The Committee issued a report, based on those hearings,[6] that contained the following conclusions: the plants are "major sources" of air pollution, which have measurably degraded air quality in the Southwest. Development of proposed additional plants will probably result in further degradation.[7] The report also found serious environmental impact from strip mining for coal burned at the plants which was not receiving adequate attention;[8] as well as water quality problems.[9] The report attributed these problems primarily to inadequate planning.[10]

In response to the public outcry over these plants, the Interior Department conducted a massive interdisciplinary study of their environmental effects.[11] That study revealed that all six plants would violate applicable air quality standards,[12] and that these emissions were causing "severe reductions in visibility."[13] 48,000 acres would be strip mined to fuel the plants.[14] Almost 21,000 acres would be disturbed by

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[5]4 Southwest Power Plant Hearings, *supra* at 1139.

[6]S. Rep. No. 92-1015, 92d Cong., 2d Sess. (1972).

[7]*Id.* at 31. The Environmental Protection Agency has concluded that the Four Corners, San Juan, and Navajo power plants are exceeding national primary (health related) ambient air quality standards for sulfur oxides and has ordered the power companies to install scrubbers to control those emissions. *See* 38 Fed.Reg. 7554 (March 23, 1973); 39 Fed.Reg. 10582 (March 21, 1974).

[8]*Id.* at 35-36.

[9]*Id.* at 39.

[10]*Id.* at 24.

[11]Department of the Interior, Southwest Energy Study: Summary Report (1972).

[12]*Id.* at 9-5 and 9-12.

[13]*Id.* at 9-14.

[14]*Id.* at 9-25.

transmission lines.[15] It also noted: "Better siting of future plants could reduce the adverse visual impacts of the power-plants (e.g., Navajo plant located adjacent to a spectacular scenic and recreation area)."[16] (For a description of the plants' effect on water, *see* Point III.)

These problems are magnified enormously on the national level. The court below noted that steam power plants contribute 25 percent of all nitrogen oxides and particulate matter, and 50 percent of all sulfur oxides emitted nationally (App. 51a-52a). It also pointed out their enormous impact on water resources (App. 50a-51a). *See* Point III.

The Court of Appeals found that the problems of power plant siting, remarkably, were not covered by existing statutes and regulations. The court below found it somewhat anomalous that the FPC's jurisdiction has not included steam plants, which generate "over 80% of the electricity produced in the United States and utilize large quantities of water in doing so" (App. 92a). The opinion continued:

> In this age of pervasive federal regulation and of heightened awareness of environmental considerations, it is difficult to comprehend that there should be no federal agency or policy governing the siting and operation of fossil-fueled steam plants. One looks in vain through an array of state and federal legislation for a unified, comprehensive regulatory scheme governing power plant siting. App. 93a.

Thus, the court detected a serious "regulatory gap" involving steam power plants.

This Court has not hesitated to construe the Federal Power Act so as to fill such gaps in order to carry out Congressional policy. In *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672

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[15] *Ibid.*

[16] *Id.* at 9-27.

(1954), the question was whether the Commission could regulate prices charged by an "independent," local, natural gas producer who sold to interstate pipeline companies at its production fields. The operative jurisdictional statute was § 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), which provides in part:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale. . . .

But § 1(b) specifically states that FPC jurisdiction does not extend to:

> [A]ny other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution *or to the production or gathering of natural gas.* (emphasis added)

Despite this statutory language, the Court determined that Phillips' prices were subject to regulation. It reasoned that the "producing or gathering" exemption did not extend to producers' sales to interstate pipeline companies. The Court indicated that an important policy consideration played a major part in its decision. Regulation of such sales, the Court concluded, was essential if the purposes of the Natural Gas Act were to be carried out:

> All the gas sold in these transactions is destined for consumption in States other than Louisiana. Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas

> including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed. 347 U.S. at 680.

This Court identified an "overriding" purpose behind the Natural Gas Act — to plug a "gap" in the regulation of natural gas companies because of several court decisions holding that federal regulation of wholesale prices of gas moving in interstate commerce was unconstitutional. Two committee reports specifically referred to the need to eliminate this hiatus. "Thus," the Court concluded, "we are satisfied that Congress sought to regulate wholesales of natural gas occurring at both ends of the interstate transmission systems." 347 at 758.

The *Phillips* decision caused a major turmoil in FPC practice, extending its jurisdiction into a vast new area, with absolutely no Congressional guidelines concerning how that jurisdiction ought to be exercised. As this Court later candidly admitted, the Commission was forced to labor "with obvious difficulty to regulate a diverse and growing industry under the terms of an ill-suited statute." *Permian Basin Area Rate Cases*, 390 U.S. 747, 756 (1968). The result was "the outstanding example in the federal government of the breakdown of the administrative process." *Id.*, 390 U.S. at 758.

The rationale of the *Phillips* decision applies in this case, but the burden on the Commission will not be anywhere near as severe. Here, as in *Phillips*, the statutory scheme calling for a unified, orderly system of regulation cannot be implemented completely unless jurisdiction is extended, in this case, to all power plants whose operations have a significant impact on navigable waters. Here, too, Congress intended to close a significant legal gap in order to effectuate a comprehensive plan for regulating water development, rather than gas prices. This Court noted the existence of the "gap" filled

by the Federal Water Power Act: "Prior legislation . . . was thought inadequate, for it accommodated only the federal interest in navigation." *FPC v. Union Elec. Co.*, 381 U.S. 90, 98-99 (1965).

But, unlike the turmoil created by the *Phillips* decision, an extension of jurisdiction here could be handled smoothly by the Federal Power Commission. The FPC has been consistently on record as favoring extension of its jurisdiction to steam plants. On July 1, 1969, two FPC Commissioners proposed the enactment of the "Electric Power Coordination Act of 1969," subsequently introduced as H.R. 12585, proposing that the Commission be given such authority. In 1971, two plant siting bills calling for such jurisdiction (H.R. 6971 and 6972, 92d Cong., 1st Sess. (1971)) were introduced at the request of the FPC. Chairman Nassikas testified:

> We have recommended . . . that the Federal Power Commission be designated by statute as the federal certifying agency [for power plant siting] for the following reasons:
>
> 1. There would be no division of authority and responsibility so that accountability for timely construction of electric power generating and transmission facilities would be clearly defined.
>
> 2. Such designation would be consistent with the Federal Power Act which has delegated to the Federal Power Commission the primary federal responsibility for improving regional bulk power supply. Section 202(a).
>
> 3. The matter of plant siting and certification of bulk power supply facilities is a logical administrative extension of this primary responsibility for improving regional bulk power supply. Section 2(f), 4(a), and 7(a) [of H.R. 5277] expressly recognize the Com-

> mission's administratively established reliability program pursuant to § 202(a) of the Federal Power Act....
>
> The Commission, as an instrumentality of the Congress, now administers the nation's basic electric energy statute, the Federal Power Act. Adequacy and reliability of electric power supply are among the most basic of the purposes of that Act. They are also the objective of power plant siting legislation.
>
> Assignment of this certification responsibility to the Federal Power Commission would serve to maximize the effectiveness of the expertise which this Commission and its staff have accumulated in electric power matters in the 50 years of the Commission's existence. . . . Hearings on H.R. 5277 and Related Bills Before the Subcomm. on Communications and Power of the House Comm. on Interstate & Foreign Commerce, 92d Cong., 1st Sess., pt. 1 at 426-427 (Comm. print 1971).

The government seeks to undermine the obvious public policy advantage inherent in FPC regulation over steam plants by posing a series of questions concerning how that regulation would be implemented. These questions, it asserts, are not answered by the existing statute because "it was not designed to apply to the steam-electric industry" (Brief, p. 41). Thus, it infers, Congress could not have intended steam plants to be covered.

A similar argument was rejected by this Court in *Packard Motor Co. v. NLRB*, 330 U.S. 485 (1947). There, the question was whether foremen were "employees," who were entitled to collective bargaining protection under the National Labor Relations Act (NLRA). The dissenters argued that foremen were actually closer to being "employers" than "em-

ployees." They pointed out that "foremen were the arms and legs of management in executing labor policies." 330 U.S. at 496. If foremen were accorded a dual employer-employee status, they reasoned, there would be a serious conceptual problem — the same act by a foreman could be both an unfair labor practice attributable to management and also part of his activity as an employee, with which "the employer can interfere only at his peril." 330 U.S. at 497.

The dissent maintained:

> . . . The complications of dealing with the problems of supervisory employees strongly suggest that if Congress had planned to include them in its project, it would have made some special provision for them. But we find no trace of a suggestion that when Congress came to consider the units appropriate for collective bargaining, it was aware that groups of employees might have conflicting loyalties. Yet that would have been one of the most important and conspicuous problems if foremen were to be included. The failure of Congress to formulate a policy respecting the peculiar and special problems of foremen suggests an absence of purpose to bring them under the Act. [footnote omitted]. 330 U.S. at 498.

The majority in the *Packard* case conceded that the application of the NLRA to foremen was a particularly difficult policy question which should be left up to the Board. But the Court noted: "We are not at liberty to be governed by those policy considerations in deciding the naked question of law whether the Board is now, in this case, acting within the terms of the statute." 330 U.S. 493. As this Court has indicated in *Permian Basin Area Rate Cases*, 390 U.S. 747, 756 (1968), the fact that a statute may be in part "ill-suited" to regulation of a particular phase of an industry does not justify a construction denying jurisdiction.

VII. FEDERAL POWER COMMISSION JURISDICTION HAS NOT BEEN OUSTED BY THE "LAW OF THE RIVER".

The court below concluded that certain statutes granting to other officials such as the Secretary of the Interior wide powers to control water projects (such as the Boulder Canyon Project Act, 43 U.S.C. § § 617-17a) may have "diluted Commission authority" to license those projects. (App. 110a). Accordingly, the court held that the Commission should consider on remand "whether any jurisdiction it might have under the Federal Power Act is affected in any way by the jurisdiction of any other federal agency" (App. 112a).

The power companies maintain that the Boulder Canyon Project Act and other statutes, regulations, and treaties have in effect vested plenary control over all activities using the waters of the lower Colorado River in the Secretary of the Interior, to the exclusion of the possibility of regulation by the Federal Power Commission (Brief, Point I). They contend further that this issue should be determined judicially, not by the Commission, since this is a purely legal question, dealing with statutory interpretation (Brief, p. 22). The Indian petitioners agree that it is appropriate for this Court to take this matter up now.

But we cannot concur in their assertion that the failure of the court below to examine this question rendered its opinion advisory, and therefore reversible. The Court of Appeals could hardly be faulted for not ruling on the issue, since it was not even mentioned by the government or the intervenors until after the decision was announced. A claim raised for the first time in a petition for rehearing need not be decided by a lower court and, indeed, this Court usually will not consider such a contention either. *See American Surety Co. v. Baldwin*, 287 U.S. 156, 164 (1932). However, under the circumstances of this case, we believe it is appropriate for this Court to dispose of this issue now, in order to avoid

further litigation on remand and a likely second appeal. For the reasons discussed below, we believe this Court should instruct the Commission that its licensing jurisdiction over all six power plants is unimpaired by the authority given to the Secretary on the Colorado River.

The Indian respondents agree with the power companies that the allocation of consumptive uses of Colorado River waters is governed by the "Law of the River." Various statutes, compacts, treaties, contracts and court decrees subsumed under that nomenclature govern the competing claims to use of that water. But we do not believe that the discretionary water allocation powers given to the Secretary of the Interior by the "Law of the River" in any way supersede the regulatory duties of the Federal Power Commission.

This Court made clear the nature of the Secretary's powers to enter into water storage and delivery contracts pursuant to § 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d: he was, in essence, to take over the functions of state water allocation agencies on behalf of the federal government, performing those allocation functions in a highly discretionary manner, limited only by the very general guidelines of the Project Act. In *Arizona v. California*, 373 U.S. 546, 580 (1963), this Court announced:

> [T]hat Congress intended the Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water.

This allocation power completely superseded state laws on the subject:

> [I]t is the [Boulder Canyon Project] Act and the Secretary's contracts, not the [State] law of prior appropriation, that control the apportionment of

> water among the States. Moreover . . . we hold that the Secretary in choosing between users within each State and in setting the terms of his contracts is not bound by these sections to follow state law. 373 U.S. at 586.
>
> [W]here the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place. *Id.* at 588.

As Dean Frank Trelease commented in an often cited article:

> [T]he Secretary will control and distribute water, and the water will be used, in complete disregard of the state laws relating to these actions. F. Trelease, *Arizona v. California: Allocation of Water Resources to People, States, and Nation,* 1963 Sup. Ct. Rev. 158, 193.

Thus, the contracting authority of the Secretary of the Interior over Colorado River waters is the functional equivalent of the jurisdiction exercised by state water rights agencies over those waters before Congress took over jurisdiction for the federal government.

The Federal Power Act contemplates a shared authority between water allocation agencies and the Commission. Section 9(b) of the Power Act, 16 U.S.C. § 802(b), requires an applicant to furnish "satisfactory evidence that the applicant has complied with the requirements of the laws of the State . . . with respect to bed and banks and to the appropriation, diversion, and use of water for water purposes. . . ." And § 27 of the Power Act, 16 U.S.C. § 821, states that the Act shall not be construed so as to interfere with State laws relating to "the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

These statutory provisions completely negate the argument that the existence of a water allocation agency with broad discretion somehow ousts the FPC from jurisdiction. They show instead that Congress had intended for the Commission to work in a coordinated manner with the allocation agency, each within its own area of authority. But when State statutes or regulations concerned with the allocation of water conflict with the views of the Federal Power Commission on whether a project should be licensed, the latter agency must prevail. *See First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946); *FPC v. Oregon*, 349 U.S. 435 (1955). The Indian respondents submit that the role of the Secretary vis-a-vis the FPC is akin to that of the states, as described in the *First Iowa* case:

> In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two co-operating agencies of Government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. 328 U.S. at 167-68.[1]

However, unlike the states, which do not have a veto over FPC-approved projects [*see* C. Meyers, *The Colorado River*,

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[1]*See also* FPC v. Niagara Mohawk Power Corp., 347 U.S. 239, 252 (1954) in which this Court noted that the Federal Power Act "merely imposes . . . the additional obligation of using [water rights] in compliance with the Act."

19 Stan. L. Rev. 1, 61 (1966)], the Secretary *does* have such a veto power, since Congress has given him virtually absolute jurisdiction to allocate the waters of the Colorado. Thus, no power project could go through unless the Secretary had first agreed to allocate water to it by contract.

The Federal Power Act contemplates active participation in the decision-making process for federal agencies other than the FPC. Section 4(e), 16 U.S.C. § 797(e), provides that issuance of a license for a project on public lands and "reservations"[2] is subject to such conditions as the supervising federal agency deems necessary for protection and utilization of the reservation and must be consistent with the purposes for which the reservation was founded. The next proviso of the same section gives the Chief of Engineers and the Secretary of the Army a veto over any license that would affect the navigable capacity of navigable streams.

It is not a proper inference that by giving the Secretary power over the allocations of waters from the Boulder Canyon Project (43 U.S.C. § 617d), Congress thereby intended to divest the FPC of jurisdiction over power produced through the use of such waters (power companies' Brief, pp. 20, 23). The power companies assert, without citing any authorities, that somehow the Boulder Canyon Project Act partially repealed the Federal Power Act as it applies to the Colorado River. This Court recently reaffirmed the "cardinal rule . . . that repeals by implication are not favored." *Morton v. Mancari*, ___ U.S. ___, 41 L.Ed.2d 290, 300 (Nos. 73-362 and 73-364, June 17, 1974), quoting *Posedas v. National City Bank*, 296 U.S. 497, 503 (1936). *Mancari* announced the rule that:

> In the absence of some affirmative showing of an intention to repeal, the only permissible justifica-

[2]"Reservations" include national forests, tribal lands on Indian reservations, federal land withdrawn from private appropriation under the public land laws and any interests in lands "acquired and held for public purposes." 16 U.S.C. §796(2).

> tion for a repeal by implication is when the earlier and later statutes are irreconcilable. *Ibid.*

As we have shown, broad delegation of authority to the Secretary is not at all irreconcilable with continued regulatory activity by the FPC. And the language of the Boulder Canyon Project Act, far from manifesting an "affirmative . . . intention to repeal," inescapably shows that Congress meant for FPC jurisdiction to continue. The last paragraph of § 6 of the Project Act, 43 U.S.C. § 617e, provides:

> The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries . . . until this subchapter shall become effective.

The Boulder Canyon Project Act has been effective since June 25, 1929 (46 Stat. 3000). Thus, Congress unequivocally demonstrated that it wanted the FPC to continue to exercise its jurisdiction on the Colorado River, after a temporary interruption.

The other major piece of legislation relied upon by the power companies also compels the conclusion that the FPC retains jurisdiction. The Colorado River Basin Project Act, 43 U.S.C. § § 1501, *et seq.*, like the Boulder Canyon Project Act, gives the Secretary of the Interior the power to allocate waters from a major federal project (in this case, the Central Arizona Project). And, as it did in the Boulder Canyon Project Act, Congress expressed awareness of and confirmed FPC jurisdiction over the Colorado River. 43 U.S.C. § 1555 provides: "Part I of the Federal Power Act shall not be applicable to the reaches of the main stream of the Colorado River between Hoover Dam and Glen Canyon Dam until and unless otherwise provided by Congress." Obviously, Congress believed that FPC jurisdiction continues on the rest of the River, or this specific withdrawal of authority would have been unnecessary.

The power companies complain that the Commission would be relegated to the role of a superfluous "mother-in-law, cooking in the Secretary's kitchen," if its jurisdiction on the Colorado is confirmed (Brief, p. 38). In fact, the two agencies have very different roles to play. These roles are not in conflict. The Secretary's function is legislative in nature — he must allocate Colorado River water among the states and among competing uses within the states. *Arizona v. California, supra* at 580. The Secretary's activities are subject to the give-and-take of political considerations,[3] as irrigation, municipal, industrial, and recreational interests seek to persuade him of the advantages of awarding contracts for the scarce water to them.

The Federal Power Commission, on the other hand, is an independent agency which conducts quasi-judicial regulatory proceedings in the context of a broad responsibility for nationwide planning of water resource and power development. Unlike the Secretary's activity, which is largely discretionary,[4] the substantive and procedural factors governing the FPC's decision-making process have been meticulously detailed in the Federal Power Act, a comprehensive set of regulations, and various judicial decisions.

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[3]Arizona v. California, 373 U.S. 546, 626, 629-30 (1963), dissents of Justices Harlan and Douglas.

[4]This Court has noted the "broad power" Congress has delegated to the Secretary. Arizona v. California, *supra* at 585. In the same opinion, this Court continued:

> We have held that the Secretary is vested with considerable control over the apportionment of Colorado River waters. . . . While the Secretary must follow the standards set out in the Act, he nevertheless is free to choose among the recognized methods of his own. This choice, as we see it, is primarily his, not the Master's or even ours. . . . *Id.* at 593.

Dean Trelease has commented that "the Secretary's discretion is limited only by the vaguest of standards. . . ." F. Trelease, *Arizona v. California: Allocation of Water to People, States, and Nation*, 1963 Sup. Ct. Rev. 158, 195. Indeed, the dissenters in Arizona v. California thought that the "delegation of such unrestrained authority to an executive official raises, to say the least, the gravest constitutional doubts." 373 U.S. at 626.

One of the main substantive policies embodied in the Federal Power Act is the protection of the public's interest in a valuable natural resource, the power potential and navigable capacity of rivers (*see* Point II *supra*). Thus, the Commission's primary duty is to scrutinize carefully any proposed development, to assure that the public interest is served. As this Court noted in *Udall v. FPC*, 387 U.S. 428, 450 (1967):

> A license under the Act empowers the licensee to construct, for its own use and benefit, hydroelectric projects utilizing the flow of navigable waters and thus, in effect, to appropriate water resources from the public domain. The grant of authority to the Commission to alienate federal water resources does not, of course, turn simply on whether the project will be beneficial to the licensee. Nor is the test solely whether the region will be able to use the additional power. The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest." . . .

Perhaps the most important "public interest" requirement is contained in § 10(a) of the Power Act, 16 U.S.C. § 803(a). That section requires the Commission to make a finding that a proposed project "will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes. . . ." This Court has interpreted § 10(a) as requiring the FPC to explore such issues as "future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife," before issuing

a license. *Udall v. FPC, supra* at 450. The "public interest" considerations mentioned in *Udall v. FPC, supra,* may, in some cases, outweigh the desirability of developing power, thereby requiring denial of a license application. *See, e.g., Namekagon Hydro Co.,* 12 F.P.C. 203 (1953), *aff'd,* 216 F.2d 509 (7th Cir. 1954); *Public Utility Dist No. 1 of Skamania County, Washington,* 32 F.P.C. 444 (1964). Other judicial opinions have recognized the Commission's "specific planning responsibility" under § 10(a). *See, notably, Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608, 613 (2d Cir. 1965), *cert. denied,* 384 U.S. 941; *Greene County Planning Bd. v. FPC,* 455 F.2d 412, 423 (2d Cir. 1972), *cert. denied,* 409 U.S. 849.

Section 10 also imposes a host of other requirements to protect the public interest. A licensee must maintain a power project so as to avoid impairing navigation and must operate such a project in conformity with the Commission's rules for the protection of life, health and property. 16 U.S.C. § 803(c). There are numerous financial requirements. A licensee must maintain adequate depreciation reserves (16 U.S.C. § 803(c)) and amortization reserves (16 U.S.C. § 803(d)); must pay a reasonable annual charge for administration expenses and use of government lands, government dams, and Indian lands (16 U.S.C. § 803(e)); and must pay the United States for any headwater benefits received as a result of construction of an upstream government dam (16 U.S.C. § 803(f)). Of special significance to the Indian respondents is the provision of 16 U.S.C. § 803(e) giving Indian tribes a veto over any project to be located on tribal land.[5]

Other sections of the Power Act afford additional safeguards for the public interest: a licensee must construct and maintain, or allow the government to construct and maintain,

[5]*See* Montana Power Co. v. FPC, 445 F.2d 739, 756 (D.C. Cir. 1970), *cert. denied,* 400 U.S. 1013.

structures useful for navigation (16 U.S.C. § 804). The government may take over operation of any project after expiration of a license (16 U.S.C. § 807). The FPC must give preference among competing applicants to states and municipalities (16 U.S.C. § 800(a)), and may not grant a license to a private applicant if it finds that a project should properly be undertaken by the government itself (16 U.S.C. § 800(b)).

The public interest is given additional protection by a number of statutory and regulatory procedural provisions. The Commission has wide investigatory powers to assure compliance with the Act and may compel the attendance of witnesses and production of evidence (16 U.S.C. § 825f); any person may file a complaint with the Commission when a violation of the Act occurs (16 U.S.C. § 825e); licenses are to be granted only after notice (18 C.F.R. § 1.19(b)) and a hearing on the record (16 U.S.C. § 825g, 18 C.F.R. § 1.20), at which witnesses are subject to cross-examination (18 C.F.R. § 1.22). A Commission decision must include a statement of findings and conclusions and the basis therefor (18 C.F.R. § 1.30(g)); and any party aggrieved by a Commission action is entitled to judicial review (16 U.S.C. § 825*l*. None of these protections are available in connection with the discretionary award of a water delivery contract by the Secretary.

This case illustrates a relatively common phenomenon — concurrent and even partially overlapping jurisdiction by "two agencies of the Government having duties in relation to the development of national water resources." *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 155 (1953). Uniformly, the courts and Congress have sought to harmonize competing claims to authority, rather than ruling that one agency should prevail, to the complete exclusion of the other. In *Nantahala Power & Light Co. v. FPC*, 384 F.2d 200 (4th Cir. 1967), *cert. denied*, 390 U.S. 945, the court rejected the

identical claim asserted in this case — that broad water allocational powers given to another agency concerned with development of a river basin superseded the FPC's jurisdiction. The power company there maintained that under 16 U.S.C. § 831y-1[6] operations at its project on the Tennessee River were so completely controlled by the Tennessee Valley Authority that TVA in effect operated the plant itself, thereby precluding FPC jurisdiction. The court noted that an ouster of FPC jurisdiction could not lightly be inferred:

> However, were we to infer from these incidents of control, an "operation" of the facilities by the TVA in the broad sense advocated, the result would be startling indeed. It would, in effect, exempt from the Power Act's licensing requirements all developments in the Tennessee River System. . . . The Commission, whose interests are broader

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[6]Section 831y-1 provides that:

> The unified development and regulation of the Tennessee River system requires that no dam, appurtenant works, or other obstruction, affecting navigation, flood control, or public lands or reservations shall be constructed, and thereafter operated or maintained across, along, or in the said river or any of its tributaries until plans for such construction, operation, and maintenance shall have been submitted to and approved by the Board; and the construction, commencement of construction, operation, or maintenance of such structures without such approval is hereby prohibited. When such plans shall have been approved, deviation therefrom either before or after completion of such structures is prohibited unless the modification of such plans has previously been submitted to and approved by the Board.
>
> The requirements of this section shall not be construed to be a substitute for any other law of the United States . . . but shall be in addition thereto, so that any . . . license . . . now or hereafter required by the provisions of any such law for the construction, operation, or maintenance of any structures whatever, except as may be constructed, operated, or maintained by the [TVA], shall be required, notwithstanding the provisions of this section.

This grant of power to TVA to control the utilization of Tennessee River waters is *at least* as extensive as the Secretary's powers under the "Law of the River." Nowhere is the Secretary given authority, like the TVA, to regulate *obstructions* in the Colorado River, as opposed to water use.

> than those of the TVA, and certainly no less important, would be precluded from implementing needed improvements or modifications consistent with the *national* interest. 384 F.2d at 213.

The *Nantahala* court also rejected the contention that "the Commission's regulatory power would, in light of the control exercised by the TVA . . . subject it to two masters, who may not always see eye to eye." 384 F.2d at 214. It noted that there was an "ample basis for accommodation among the interested parties. . . ." *Ibid.*

This Court considered and rejected a claim that the adoption of a comprehensive plan for development in a river basin by another branch of government (in that case, the Corps of Engineers) divested the FPC of jurisdiction to license private dams at any of the sites included in the plan. *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953). Justice Frankfurter characterized the power companies' claim in the *Chapman* case as follows: "[T]he authority of the agency to which Congress has delegated the responsibility for safeguarding the public interest in the private development of power resources has been revoked pro tanto by congressional action as to this particular site." 345 U.S. at 157.

This Court reviewed the FPC's broad authority to carry out a "general power policy," comparable to that of the Interstate Commerce Commission in the transportation field. Justice Frankfurter noted that Congress had made the Commission "the permanent disinterested expert agency of Congress to carry out these policies." 345 U.S. at 168. And concluded:

> [W]e find no solid ground for concluding that Congress has taken over the entire river basin for public development with such definiteness and finality so as to warrant us in holding that Congress has withdrawn as to this whole river basin its general grant of continuing authority to the Federal Power

Commission to act as the responsible agent in exercising the licensing power of Congress. 345 U.S. at 167.[7]

This phenomenon of concurrent jurisdiction by two federal agencies in a common subject matter is common in administrative law. There are any number of cases where this Court has arbitrated between competing agencies, without divesting either of jurisdiction. *See, e.g., Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962); *Northwestern Elec. Co. v. FPC*, 321 U.S. 119 (1944); *Swift & Co. v. United States*, 316 U.S. 216 (1942).

Neither the FPC nor the Secretary has ever previously asserted that the Secretary's broad planning and allocation powers on the Colorado River precluded Commission jurisdiction. Indeed, the Secretary has acquiesced in the Commission's assertion of authority over the River. The FPC held hearings on an application by the State of Arizona to build a hydroelectric dam on the River at Marble Canyon, 55 miles downstream from the Glen Canyon Dam.[8] The Secretary moved to intervene in order to assert his "responsibility to ensure the orderly investigation, planning and ultimate construction of a comprehensive system of water development projects with respect to the Colorado River System." *Arizona Power Authority*, 28 F.P.C. 769, 771 (1962) (concurring opinion). Limited and later full intervenor status was

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[7]*See also* the Flood Control Act of 1944, which recognizes and attempts to harmonize the often competing claims of federal agencies to jurisdiction over water projects. While the Secretary of the Interior is empowered to investigate and propose irrigation projects, the Secretary of the Army must be kept informed and the latter official has a veto over such projects which can be overridden only by Act of Congress. 33 U.S.C. §701-1(c).

[8]The plans for the proposed Marble Canyon and Hualapai Dams, which would have encroached on the Grand Canyon, provoked such violent opposition that Congress later withdrew the FPC's jurisdiction to issue licenses for construction in this reach of the River, reserving the final decision to itself. 43 U.S.C. §1555. *See* 3 U.S. Code Cong. & Admin. News, 90th Cong., 2d Sess. 3730 (1968).

granted. *See* 30 F.P.C. 494 (1963). *See also Phelps Dodge Corp.*, 29 F.P.C. 552 (1963), in which the Commission licensed a dam on a Colorado River tributary that was subject to the "Law of the River." The Secretary appeared in that proceeding, too, without disputing FPC jurisdiction.

Even if the power companies are correct in their assertion that the allocation and planning authority given the Secretary by the "Law of the River" ousts the FPC from jurisdiction, this would not be true for all the plants involved in this appeal. Two of the plants are using water that is *not* under the Secretary's control. The Four Corners plant uses water rights granted by the New Mexico State Engineer (power companies' supplement to Brief, p. 96S); Huntington Canyon uses water rights purchased from private individuals (*Id.* at 119S). Thus, the controversy regarding FPC jurisdiction over these two plants would remain justiciable, regardless of the effect of the Secretary's supposed "plenary" authority on the other plants.

The power companies advance a trivial argument that the Indian respondents lack standing. It is utterly without merit. The complaint alleges that the six power plants will be responsible for severe air and water pollution, cause massive ecological imbalance, threaten them with economic harm, and damage aesthetic, cultural, recreational and economic values on their homelands. This is certainly "injury in fact," and the Indian respondents are clearly themselves "among the injured," as required by the first part of this Court's latest explication of the standing doctrine in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). (*See also Sierra Club v. Morton*, 405 U.S. 727, 734 (1972), recognizing the right of local residents to achieve redress for "aesthetic and environmental injury.") This injury is certainly within "the zone of interests" protected by the Federal Power Act, the second part of the *SCRAP* standing test. *See* the cases cited in the

opinion below detailing the Commission's environmental concerns (App. 95a, n. 138).

The Indian respondents are also worried about increased salinity in the Colorado River. Operations at present and projected Colorado Basin power plants may increase salinity levels in the lower Colorado River by as much as 4 percent. Southwest Energy Study: Summary Report at 9-49 (1972). Those levels are already at the critical stage; even a small increase may render the water unuseable. *See, e.g.*, S. Rep. No. 906, 93rd Cong., 2d Sess. (1974); H. Rep. No. 1312, 90th Cong., 2d Sess. (1968), reprinted at 3 U.S. Code Cong. & Admin. News 3666, 3698, 3699 (1968).

Finally, the power companies advance what one must assume is a tongue-in-cheek argument that it makes no difference to the Indian respondents whether the Secretary or the Commission has jurisdiction. Aside from the numerous protections and opportunities available only before the FPC which we catalogued above, there is an obvious disparity in the remedies available in the event of an unfavorable decision. As this Court noted in *Dugan v. Rank*, 372 U.S. 609, 623-24 (1963), under the Reclamation laws, the Secretary is entitled to operate projects and distribute water "solely on his own, without court interference," even to the extent of taking existing property rights without compensation, relegating the owners to the remedy of inverse condemnation. In contrast, failure of the Federal Power Commission to consider and, if appropriate, to mandate measures designed to mitigate environmental impact is grounds for reversal. *See Udall v. FPC*, 387 U.S. 428, 450 (1967); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 614 (2d Cir. 1965), *cert. denied*, 384 U.S. 941; *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 423-24 (2d Cir. 1972), *cert. denied*, 409 U.S. 849.

CONCLUSION

As we showed in Point III, the objectives of the Federal Power Act can now be carried out only if steam power plants are subject to the FPC's licensing jurisdiction, as permitted by the statutory language. The exercise of such jurisdiction would not create any insurmountable practical problems. Indeed, the Commission has often said it would like to exercise authority in this field. While the government (Brief, pp. 38-39) and the court below (App. 96a-97a) accuse the Indian respondents of advocating judicial legislation, we strongly maintain that this is not the case. We are only asking this Court to interpret an existing statute *as it is written.*

Rather, it is *they* who advocate unwarranted judicial intervention into the legislative process by seeking to vary the plain language used by Congress on the strength of speculation about what a long-dead group of legislators would have thought about a problem that was not in existence at the time. We believe that this Court should follow the advice of Mr. Justice Holmes: "We do not inquire what the legislator meant; we ask only what the statute means." Holmes, *Collected Legal Papers* 207, quoted at *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 397 (1951) (Jackson, J. concurring).

The judgment of the Court of Appeals should be affirmed insofar as it holds that the six plants in this case must be licensed by the Federal Power Commission, but reversed as to its holding that the plants are not covered by the project works clause. This Court should also declare that the Com-

mission's jurisdiction is not superseded or diminished by the authority of any other federal agency.

Respectfully submitted,

JOSEPH J. BRECHER
JOHN E. ECHOHAWK

Attorneys for The Chemehuevi Tribe of Indians, et al.

Of Counsel:

Native American Rights Fund

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(See list of attorneys on inside cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.
Law Offices of Northcutt Ely
Watergate 600 Building
Washington, D. C. 20037
and
HARRY A. POTH, JR.
PEYTON G. BOWMAN, 3RD
Reid & Priest
40 Wall Street, New York,
New York 10005

1701 K Street, N. W.
Washington, D. C. 20006
Attorneys for all Petitioners

NICHOLAS H. POWELL
Snell & Wilmer
400 Security Building
Phoenix, Arizona 85004
Attorneys for Arizona Public Service Company

WILLIAM DUNCAN
Kemp, Smith, White, Duncan & Hammond
P. O. Box 2800
El Paso, Texas 79999
Attorneys for El Paso Electric Company

BURT S. PINES, City Attorney
EDWARD C. FARRELL, Chief
Assistant City Attorney for
Water and Power

RALPH GUY WESSON
Assistant City Attorney
111 North Hope Street
Los Angeles, California 90051
Attorneys for Department of Water and Power, City of Los Angeles

M. GENE MATTEUCCI
P. O. Box 230
Las Vegas, Nevada 89101
Attorney for Nevada Power Company

REX E. LEE
2840 Iroquois Drive
Provo, Utah 84601
Jennings, Strouss & Salmon
111 W. Monroe Street
Phoenix, Arizona 85003
Attorneys for Salt River Project Agricultural Improvement and Power District

SHERMAN CHICKERING
C. HAYDEN AMES
EDWARD P. NELSEN
ALLAN J. THOMPSON
Chickering & Gregory
111 Sutter Street
San Francisco, California 94104
Attorneys for San Diego Gas & Electric Compan

JOHN R. BURY
Assistant General Counsel
P. O. Box 800
Rosemead, California 91770
Attorney for Southern California Edison Company

L. V. ROBERTSON, JR.
General Attorney
Tucson Gas and Electric Company
220 West Sixth Street
Tucson, Arizona 87503

DONALD E. DICKERMAN
Holesapple, Conner, Jones, McFall & Johnson
P.O. Box 310
Tucson, Arizona 85702
Attorneys for Tucson Gas & Electric Company

SIDNEY G. BAUCOM
ROBERT GORDON
P.O. Box 899
Salt Lake City, Utah 84110
Attorneys for Utah Power & Light Company

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REPLY BRIEF OF ARIZONA PUBLIC SERVICE COMPANY, ET AL.

INTRODUCTION

Parts I-IV of this brief answer our opponents' argument as to the "project works" licensing jurisdiction of the Federal Power Commission.

Parts V and VI answer their argument as to the Commission's "surplus water" licensing jurisdiction.

I. THE FEDERAL WATER POWER ACT CANNOT BE CONSTRUED AS INCLUDING STEAM PLANTS WITHIN THE COMMISSION'S LICENSING JURISDICTION UNLESS THE RATIONALE OF THE TAUM SAUK DECISION IS REJECTED.

The majority opinion in the *Taum Sauk* licensing case, *FPC* v. *Union Electric Co.*, 381 U.S. 90 (1965), authored by Mr. Justice White, holding that a pumped-storage hydro plant required a license, said that "the distinction between a hydroelectric project and a steam plant is obvious and meaningful, although both produce energy for interstate transmission."[1]

The dissenting opinion, by Mr. Justice Goldberg, in which Mr. Justice Harlan and Mr. Justice Stewart joined, said that ". . . the legislative history here, however, establishes to my satisfaction that it [the Act] has required licenses of neither steam plants nor the type of hydroelectric plant here involved. . . ." (*Id.* at 115.)

Both authors were answering the argument that if the test of FPC's licensing jurisdiction under Sections 4(e) and 23(b) were the effect of a given generating plant on interstate transmission, rather than its effect on navigable capacity, there was no distinction between a pumped-storage plant (involved there) and a steam plant. If our opponents were right about steam plants, the ready premise for Mr. Justice White's holding that a pumped-storage plant requires a license would have been to agree that both plants are indeed in the same situation, hence the pumped-storage plant requires a license because the steam plant requires one. Rejecting this, the Justice made the pointed distinction that pumped-storage plants are subject to

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[1] FPC v. Union Electric Co., 381 U.S. 90, 110 (1965). Our opponents flatly contradict this, saying (Opp. Br. 53), ". . . this distinction is *not* obvious and meaningful . . . ."

license because "Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water," but steam plants are excluded because of "this central concern of the Act." Our opponents' argument that the Court's language which made this distinction should be disregarded now, because the Court was not then fully informed, needs no answer. And our opponents are equally at odds with the minority opinion which, even though it posited that there was no jurisdictional distinction between steam plants and pumped-storage plants, concluded that the legislative history establishes that licenses are required of neither of them.

II. THE ARGUMENT THAT IN 1920 CONGRESS INTENDED TO REQUIRE LICENSING OF STEAM PLANTS, WITHOUT SAYING SO, IS REBUTTED BY EVERY CANON OF STATUTORY CONSTRUCTION.

A. All nine Justices in the Taum Sauk case looked to the same guides for construction of the Federal Power Act that we urge here.

The majority examined the history of the predecessor statutes (pp. 98-99). They quoted the title, saying (p. 99), "the principal use to be developed and regulated in the Act, as its title indicates, was that of hydroelectric power to meet the needs of an expanding economy." They said (p. 100) that "the provisions of the Act reflects these objectives," noting (p. 100) that "the preface states that beside navigation and the creation of the Commission, the Act was 'to provide for the . . . development of water power; the use of the public lands in relation thereto . . . and for other purposes'." The Court also examined the legislative history in detail (pp. 101-08) to determine Congress' intent.

The minority, as we have noted, looked to the same criteria, annexing two appendixes detailing the legislative history (pp. 115-23).

B. The "unadorned," "plain," language of the Act, which does not mention steam plants, certainly does not close the door on legislative history, as our opponents contend.

Our opponents say that the legislative history quoted in our opening brief and its supplement is irrelevant, because the "unadorned" language of the Act plainly gives the Commission licensing jurisdiction over steam plants (Opp. Br. 10).

The Court in the *Taum Sauk* case did not discover this "plain meaning," notwithstanding its holding (p. 100) that "the purposes of the Act are more fully served if the Commission must, as it held in this case, consider the impact of the project on the full spectrum of commerce interests." Yet it excluded steam plants from this "spectrum," after an exhaustive analysis of the language of the Act and its legislative history, finding no "unadorned language" which included steam plants. Nor did the minority, which excluded them after an equally searching analysis of the legislative history (p. 115).

All of these factors which were treated as relevant to the meaning of the Federal Power Act in the *Taum Sauk* case should now be ignored, according to the complainants, in favor of the literalness of the terms "project works" and "surplus water," even though "literalness may strangle meaning," *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44 (1946), and even though "this Court [has] repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute." *Lynch* v. *Over-*

holser, 369 U.S. 705, 710 (1962); *Church of Holy Trinity* v. *United States,* 143 U.S. 457 (1892).

When words such as "project works" or "surplus water," which are inherently imprecise, are used in a statute, this Court looks, *inter alia,* to legislative history to determine a statute's meaning. *E.g., U.S.* v. *American Trucking Association,* 310 U.S. 534, 543-44 (1940) ("employees"); *United States* v. *Rosenblum Truck Lines,* 315 U.S. 50 (1942) ("common carrier"); *Maestro Plastic Corp.* v. *NLRB,* 350 U.S. 270 (1956) ("any strike").

Contrary to the complainant's views, the proper method of statutory interpretation has been stated by this Court as follows:

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.
>
> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the

> policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States v. American Trucking Association,* 310 U.S. 534, 543-44 (1940).

Construction of the Federal Power Act should be no exception.

C. The curious argument that the Act includes steam plants because "Congress was not thinking about steam plants at all" (Opp. Br. 26) collapses of its own weight.

This is not a case which presents the problem of whether a statute written in comprehensive terms includes a business which comes into existence after its enactment, as argued in the opposing brief, pp. 32-40, with reference to such instances as cable television,[2] radio broadcasting, etc.

By contrast, all sides agree that steam plants were not only in existence in 1920, but that they accounted for the greater part of the electrical power production of this country at that time, as they do now.[3] Congress,

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[2] The FCC has "broad responsibilities for the orderly development of an appropriate system of local television broadcasting," United States v. Southwestern Cable Co., 392 U.S. 157, 177 (1968), and the Communications Act envisions a "unified and comprehensive regulatory system for the industry." *Id.* at 168. It cannot be said that the Federal Power Act evinces Congress' intent to regulate all sources of electricity, including nuclear plants, fossil-fuel plants not proximate to navigable waters, geothermal plants, gas turbines and diesel plants, and the plants involved in this case.

[3] Chemehuevi Tribe of Indians, et al. v. FPC, 489 F.2d 1207, 1216-17, and n. 43, 1229-30 (D.C. Cir. 1973); *see* Udall v. FPC, 387 U.S. 428, 445-47, n. 11 (1967).

in 1920, knew a great deal about steam plants, which were mentioned repeatedly in the debates as unlicensed competitors of the hydro projects intended to be licensed.[4]

D. The administrative construction of the Act as excluding steam plant licensing was repeatedly and consistently reported to Congress over a period of a half century, and is entitled to great weight.

The Commission's first report to Congress in 1921 stated that its jurisdiction was limited to hydro power projects. The opposing brief points out that the Commissioners so reporting did not hold office during the previous year (Opp. Br. 47), when Congress enacted the Act. This is quite immaterial. They were the men charged with responsibility for "setting its machinery in motion."[5] *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408 (1961). This administrative construction was reported consistently in at least 23 annual reports thereafter,[6] and is entitled to "great weight." *Trafficante*

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[4] *E.g.*, 51 CONG. REC. 12336, 12593, 12777 (1914); 53 CONG. REC. 2640, 10450 (1916); 56 CONG. REC. 8931, 9282 (1918); 59 CONG. REC. 1101, 1430, 1473 (1920). Congress desired to foster water power development as a means to encourage conservation of coal and oil. *E.g.*, 56 CONG. REC. 9112 (1918); 59 CONG. REC. 241, 1223, 6532 (1919).

[5] As it happened, O. C. Merrill, a principal architect of the Federal Water Power Act, lauded by our opponents (Opp. Br. 50), was the Executive Secretary of the Commission at the time this report was prepared and submitted to Congress.

[6] See the Commission's Annual Reports for the following years: 1935, p. 1; 1939, p. 2; 1940, pp. 1-5; 1946, pp. 2-3; 1949, p. 3; 1950, p. 3; 1951, p. 2; 1956, pp. 3, 5; 1957, pp. 3, 4; 1958, p. 4; 1959, p. 4; 1960, p. 5; 1961, p. 7; 1962, pp. 8, 12-13; 1963, p. 7; 1964, pp. 10-11, 13; 1965, p. 10; 1966, pp. 8-9, 13; 1967, p. 25; 1968, p. 29; 1969, p. 25; 1970, p. 31; 1971, p. 22.

v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

III. SUBSEQUENT CONSISTENT REFUSAL BY CONGRESS TO GRANT THE COMMISSION LICENSING JURISDICTION OVER STEAM PLANTS IS DISPOSITIVE AS TO LEGISLATIVE INTENT.

Complainants' brief ignores the occasions, at least four in number, on which Congress has declined to amend the Federal Power Act to grant the Federal Power Commission jurisdiction to license steam plants.

In 1935 Congress enacted the Federal Power Act, which included, as Part I, the entire text of the Federal Water Power Act, and added, as Part II, regulatory provisions relating to utilities' rates, interconnections, securities, etc. An amendment was proposed to the portion of the bill which became Title II, to add a section which would grant the Commission authority to "certificate" (license) all forms of "production facilities" and transmission lines. It was rejected in committee, in the Senate.[7] Senator Wheeler, the author of the pending bill, explained on the Senate floor:

> "Mr. Wheeler: . . . Let me say this further to the Senator: The bill as it was originally prepared by the proponents and introduced contained a provision to the effect that a power company would have to come to the commission for a certificate of convenience and necessity before it could construct a power plant, or a transformer, or anything else of that kind, within a State. In the committee, I insisted that this be stricken out, because I felt that we should not go so far in this bill, because it was not necessary." 79 Cong. Rec. 8431 (1935).

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[7] S. Rep. No. 621, 74th Cong., 1st Sess. 20 (1935).

Instead, Congress in 1935 reenacted Section 4(e) of the Federal Water Power Act (16 U.S.C. 797(e)) without change as part of Title I of the Federal Power Act, and added the first sentence of Section 23(b) (16 U.S.C. 817),[8] well informed of the Commission's construction that its licensing jurisdiction was limited to hydro projects. This Court has held that congressional reenactment of a statute, in knowledge of consistent administrative interpretation of it, is significant as indicating satisfaction with that interpretation. *Cammarano* v. *United States*, 358 U.S. 498, 510-11 (1958); *Massachusetts Mut. L. Ins. Co.* v. *United States*, 288 U.S. 269, 273 (1933).

The 1935 decision by Congress, in our view, disposes of our opponents' case.

Congress' subsequent actions confirmed its 1935 decision. In 1962, 1971, and 1972, Congress considered the renewed request of the Commission to license steam plants, and heard its supporting testimony to the effect that it did not have, but should have, this authority.[9] Congress did not grant the request.

The consistent course followed by Congress for a half-century was not congressional inaction; it mani-

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[8] These are the two sections which contain references to "surplus water or water power from any government dam."

[9] FORTY-SECOND ANNUAL REPORT OF THE FEDERAL POWER COMMISSION, 102-03 (1962); *Hearings on Power Plant Siting and Environmental Protection Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. 411 (1971) (Statement of Chairman Nassikas); *Hearings on Interim Nuclear Licensing Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 2d Sess. 249, 261 (1972) (Statement of Chairman Nassikas).

fested a continuing and consistent determination to stay out of the field.

IV. THE "CHANGED CIRCUMSTANCES" ARGUMENT IS PIERCED BY ITS OWN STATISTICS.

It is argued (Opp. Br. 20) that "Congress did not consider whether steam plants needed to be regulated in 1920 because their operations had no effect on the hydro potential of navigable streams, but fundamental changes in their method of operations have now brought steam plants within the range of evils Congress sought to regulate under the Federal Power Act; under these circumstances, jurisdiction should be construed expansively."

If this were so, it might be thought that Congress, in this half-century, would have discovered this and legislated to expand the FPC's licensing jurisdiction to include steam plants. The record is to the contrary. By 1935, when Congress rejected an amendment which would have done this (*supra*, p. 8), the capacity of steam generating plants, which had been 8,920,000 kw in 1920, had more than doubled, to 24,471,000 kw.[10] By 1962, when it refused to act on FPC's request for jurisdiction to license steam plants (*supra*, n. 9), their capacity had increased to 149,943, 000 kw,[11] nearly 16 times the 1920 figure. By 1972, when Congress again received, but did not act upon, FPC's renewed request for licensing jurisdiction over steam plants (*supra*, n. 9), their capacity had increased to 322,944,000 kw,[12]

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[10] EDISON ELECTRIC INSTITUTE, HISTORICAL STATISTICS OF THE ELECTRIC UTILITY INDUSTRY 4 (1962).

[11] EDISON ELECTRIC INSTITUTE, STATISTICAL YEARBOOK OF THE ELECTRIC UTILITY INDUSTRY FOR 1973 at 6 (1974).

[12] *Id.*

over 35 times the 1920 level. The consistent congressional decision has been to leave the matter of certification of steam plants with the States in which the plants are located.

And it is quite misleading to base a claim for expansion of licensing jurisdiction to encompass steam plants on assertions that there have been "fundamental changes in their method of operation" (Opp. Br. 26). The change alleged is that whereas in 1920 "they returned virtually all their cooling water to the streams, so that it could be used again for other purposes, such as hydro generation" (Opp. Br. 29), now they "permanently and substantially diminish the total volume of the river, and, thus, the hydro-electric power potential at all downstream water power sites" (Opp. Br. 31). But the statistics give an opposite answer.

First, on a national scale over 99.2% of the water diverted for cooling in 1971 (the latest year for which such data have been published) was returned to the stream, and there was thus no great reduction of the flow.[13]

Second, the argument that consumption of cooling water in steam plants reduces the quantity available for downstream hydro generation (Opp. Br. 31) is subject to a *reductio ad absurdum*. For example, the consumption of an acre-foot of water in the cooling system of the Navajo steam plant at Lake Powell facilitates the production of 504,000 kwh of energy, whereas the same acre-foot falling from Lake Powell through Glen Canyon, Hoover, Davis, and Parker hydro plants

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[13] FPC, STEAM ELECTRIC PLANT AIR AND WATER QUALITY CONTROL DATA: SUMMARY REPORT 24 (1974) (hereinafter "FPC 1974 Summary Report"). Of 172,391 cubic feet per second diverted, 171,142 cubic feet per second were discharged back to the stream.

would generate 1,162 kwh—a ratio of 434 to 1 in favor of use of water in the steam plant.[14] Thus, if the complainants' argument of relative productivity of water in power generation has any relevance, it works against them.

Third, our opponents' comparison of total future requirements for cooling water with total run-off of streams (Opp. Br. 31), if relevant at all, fails to take account of the number of fossil-fuel plants that use salt water for cooling, or the number of nuclear-powered plants that use either fresh or salt cooling water, both types of plants being outside the Commission's licensing jurisdiction on any construction of the Act.[15]

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[14] One acre-foot of falling water generates 461 kwh at Glen Canyon Dam, 492 kwh at Hoover Dam, 130 kwh at Davis Dam, and 79 kwh at Parker Dam. These values are determined by multiplying the rated head for each dam by a factor of 1.025. Thus, one acre-foot of water falling over all four dams generates (461 + 492 + 130 + 79) = 1,162 kwh.

The energy generation (504,000 kwh) facilitated by the consumption of one acre-foot of water at the Navajo Plant is determined by multiplying the plant's total net capacity (2,310,000 kw) by the plant factor (0.85), multiplying the result by the number of hours in a year (8,760), and dividing the result by the rate at which the plant consumes water (34,100 acre-feet per year).

The ratio of energy production at the Navajo Plant facilitated by one acre-foot of water to the energy generation caused by one acre-foot of water falling over all four dams is:

$$\frac{504{,}000}{1{,}162} = \frac{434}{1}$$

[15] In 1971, the latest year for which the FPC has published relevant figures, 125 generating plants with a total generating capacity of 61,013,000 kw, used saline water for cooling. This compares with 331 plants, with a total generating capacity of 135,332,000 kw, using "once-through" fresh water cooling systems. All other

V. THE QUESTION OF WHETHER THE "SURPLUS WATER" LICENSING CLAUSE IS GENERALLY APPLICABLE TO STEAM PLANTS DOES NOT REQUIRE DECISION IN THIS COLORADO RIVER CASE.

A. A Federal Power Commission license for the consumptive use of water stored by government dams on the Colorado River would be a nullity; authority to grant such a right is vested exclusively in the Secretary of the Interior.

If it is decided that the court of appeals was right in holding that steam plants are not "project works" requiring licenses in consequence of their use of navigable waters of the United States or of government lands, this case is finished. The further question of whether the surplus water clause would be an independent source of licensing jurisdiction is not required to be decided with respect to uses of waters of the Colorado River, because, as shown in our opening brief (pp. 21-38), Congress, in this basin, has displaced the surplus water license with the secretarial contract as the exclusive source of right to consume water supplied from government dams.[16] FPC licensing jurisdiction cannot be founded merely on the fact that a steam plant is consuming water supplied it from a government dam, exercising a privilege which the Com-

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types of cooling (ponds, cooling towers, combined systems) accounted for 233 plants with a total generating capacity of 87,063,000 kw. FPC Summary Report, table 6A, p. 21. Sources of cooling water, outside the scope of the Federal Power Act on any construction, include effluents from sewage treatment and industrial waste plants, and wells. Dry-air cooling, using no water in the cooling process, is technologically feasible, although less efficient than water-cooling.

[16] A surplus water license, even for a hydro project on the Colorado River, would be worthless unless it could command the Secretary as to the quantities that he must release from the dam, at what discharge rate, in what months, and at what hours. Of course the Commission can do no such thing.

mission cannot give, but which can only be granted (and has been granted in this case) by the Secretary. A surplus water license, if issued, could neither enlarge nor diminish the right conferred by the Secretary's water contract.

The opposing brief argues that the "Law of the River" which lodges in the Secretary of the Interior the exclusive power to grant, by contract, the right to use water stored by a government dam, is simply analogous to cases in which Congress requires that permits be obtained from several government agencies before some kinds of businesses can be conducted (Opp. Br. 76-78). The thought seems to be that a steam plant consuming water supplied from Hoover Dam, or Glen Canyon Dam, or Navajo Dam, or Emery County Project Dam, must obtain both an FPC surplus water license and an Interior Department water contract. Not so. The two documents serve the same function, as we shall see in examining the legislative history and administrative construction of surplus water licenses for the use by hydro plants of water supplied from government dams on navigable streams (*infra*, Part VI).

B. The assertion that this case reveals a dangerous "gap," through which "the Colorado River is flowing, unregulated, into the hands of the power companies" (Opp. Br. 40), is pure sophistry.

The Colorado is the most completely regulated river in the country. Four statutes, the Boulder Canyon Project Act (1928), the Reclamation Project Act of 1939, the Colorado River Storage Project Act (1954), and the Colorado River Basin Project Act (1968) give the Secretary complete control over release of water

from government dams for consumptive use, and require contracts with the Secretary for that use. The Federal Power Commission licenses hydroelectric projects, but no statute directs the Secretary to share with the Commission his plenary powers over consumptive use of water stored by government dams (powers which are much greater than those of a state water allocation officer, contrary to our opponents' contention, Opp. Br. 77). Complainants seek to stop, not regulate,[17] consumptive uses specifically authorized by the Secretary's contracts, and, in two instances (Navajo and San Juan), specifically authorized by Congress.

On the Colorado, neither "private power interests" nor any other interests can "appropriate for themselves the public's valuable resources in the power potential of navigable streams," thus requiring the "curb" of the Federal Power Act (Opp. Br. 20). Here, as elsewhere, no one has a property interest in running water, *United States* v. *Appalachian Power Co.*, 311 U.S. 377 (1940). Here, uniquely, the United States itself, by "congressional legislation and by acts of its officers which that legislation authorizes, has undertaken . . . to impound, and control the disposition of, the surplus water in the river not already appropriated." *Arizona* v. *California*, 298 U.S. 558, 570 (1936). The control is in the form of statutory prohibition of the use of impounded water except by contract with the Secretary of the Interior. (Our opening brief, pp. 21-38.)

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[17] Complainants in the present case sought an order to show cause why the owners of the plants "should not be required to suspend all development, planning and construction of the plants in question, pending the outcome of these proceedings" (App. 11a).

C. The argument that the FPC must license steam plants because it is responsible for planning comprehensive river development (Opp. Br. 42) is demolished by the Colorado River statutes.

The opposing brief (p. 42, *et seq.*) would deduce a mandate for comprehensive licensing from the comprehensive planning responsibility given the Commission in Section 10(a) of the Federal Power Act. But, on the Colorado, the Commission's comprehensive planning function, like the function of a surplus water license, has been overtaken and displaced by subsequent legislation.

By law, the Secretary, in concert with the States, determines what uses of Colorado River water, for municipal purposes or by industry or by agriculture, will effectuate optimum use of the resource. Section 15 of the Boulder Canyon Project Act (43 U.S.C. 617n) directed the Secretary to formulate "a comprehensive scheme of control and the improvement and utilization of the water of the Colorado River and its tributaries." In so doing, he is made subject to the Colorado River Compact among the seven basin States (43 U.S.C. 617g), which Congress approved in the same Act (43 U.S.C. 617*l*). The Upper Colorado River Basin Project Act expanded this in 1956. The Secretary was "directed to continue studies and to make a report to the Congress and to the States of the Colorado River Basin on the quality of water of the Colorado River" (43 U.S.C. 620n). In 1962 Congress intensified its directive, ordering the Secretary "to estimate the effect of additional development involving its storage and use (whether heretofore authorized or contemplated for authorization) on the remaining water available for use in the United States, to study all possible means of improving the quality of such water

and of alleviating the ill effects of water of poor quality, and to report the results of his studies and estimates to the Eighty-seventh Congress and every two years thereafter" (43 U.S.C. 615ww). In 1968, in the Colorado River Basin Project Act, Congress amplified this to require, *inter alia*, "full and complete reconnaissance investigations for the purpose of developing a general plan to meet the future water needs of the Western United States" (43 U.S.C. 1511), and "condition all contracts for the delivery of water originating in the drainage basin of the Colorado River system upon the availability of water under the Colorado River Compact" (43 U.S.C. 1551), and ordered that "Rights of the upper basin to the consumptive use of water available to that basin from the Colorado River system under the Colorado River Compact shall not be reduced or prejudiced by any use of such water in the lower basin" (43 U.S.C. 1553). The last provision conclusively deprives the Chemehuevi and Cocopah Tribes, *qua* water users, of standing to complain of uses of water by the five Upper Basin power plants, just as the decree in *Arizona* v. *California*, 376 U.S. 340 (1964), deprives these water users, like all other water users in California and Arizona, of any right to complain of uses by the Mohave Plant in Nevada.[18]

Nothing in all of this consistent delegation of planning authority to the Secretary hints any intention to

[18] Moreover, as our initial brief pointed out (pp. 40-41), the Chemehuevis and Cocopahs have present perfected rights fully protected by the Colorado River Compact and this Court's decree in Arizona v. California. If they have complaints about water quantity or salinity, the FPC is not the forum in which to decide those complaints. This Court reserved jurisdiction in Article IX of its decree (376 U.S. 340, 353).

subject its exercise to control by the Federal Power Commission,[19] and of course the Commission makes no such contention.

In the meantime, in 1965, in the Water Resources Planning Act, Congress created the Water Resources Council (42 U.S.C. 1962a), consisting of the Secretaries of the Departments of Interior, Agriculture, Army, Health, Education and Welfare, and the Chairman of the Federal Power Commission. (The President named the Secretary of the Interior Chairman.) The Council was directed to establish, "with the approval of the President, principles, standards, and procedures for federal participants in the preparation of comprehensive regional or river basin plans . . . ." (42 U.S.C. 1962a-2.) The uses which are attacked in this case are included in, or consistent with, the Secretary's comprehensive plans,[20] continuously evolving in consultations among the States and federal agencies, including FPC, through the clearing house of the National Water Resources Council.[21] The statutes do not authorize FPC to supersede these plans with its own, and the Commission does not contend otherwise.

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[19] This planning responsibility has been diligently discharged, as evidenced by the Secretary's voluminous reports. Examples are listed in Appendix A to this brief.

[20] *E.g.*, DEPARTMENT OF THE INTERIOR, SOUTHWEST ENERGY STUDY, SUMMARY REPORT (1972); DEPARTMENT OF THE INTERIOR, THE CRITICAL WATER PROBLEMS FACING THE ELEVEN WESTERN STATES (1974) (REVIEW DRAFT); REPORT ON WATER FOR ENERGY IN THE UPPER COLORADO RIVER BASIN (July 1974).

[21] *E.g.*, WATER RESOURCES COUNCIL, UPPER COLORADO REGION, COMPREHENSIVE FRAMEWORK STUDY (1971) (see Appendix XIV, ELECTRIC POWER); WATER RESOURCES COUNCIL, LOWER COLORADO REGION, COMPREHENSIVE FRAMEWORK STUDY (1971) (see Appendix XIV, ELECTRIC POWER).

D. The asserted concern of the Indians about the effect of these relatively small consumptive uses on downstream hydro plants (Opp. Br. 23, 31) and salinity (Opp. Br. 31, 90) could not be litigated in the absence of the seven States which are parties to the Colorado River Compact, and the parties to the decree in Arizona v. California.

It is said that these six steam plants will use 2% of the Colorado River water supply, and that uses by other steam plants on the river and its tributaries may ultimately increase to 5% (Opp. Br. 23). Putting to one side the fact that even the larger of these figures is so small as to be exceeded by the unavoidable percentage of errors of hydrologic measurement, the important point, missed by our opponents, is that it is for the Secretary and the States, under existing law, to make the value judgment of whether several million people shall be benefited by the electricity made available by the use of such small quantities of water for this purpose, or whether the public interest would be better served by irrigating a few thousand acres of land with the same water, as the Colorado River Compact permits to be done.

The States in which these plants are located cannot be denied the consumptive use of the quantities of water allocated to them by the compacts and by the decree of this Court in *Arizona* v. *California*, 376 U.S. 340 (1964). The question of whether the water apportioned should be used by agriculture or municipalities or industry (including steam plants) is not in the jurisdiction of the Federal Power Commission but in that of the States and the Secretary in collaboration. Our opponents contend that consumptive use by these plants "will diminish the potential for production of power at Federal hydroelectric facilities at Boulder, Glen Canyon, and other

downstream government dams by a substantial amount" (Opp. Br. 23), ignoring the fact that these depletions are protected by the apportionments made by the Colorado River Compact and this Court's decree in *Arizona* v. *California*. This is a rather officious argument in any event, because it is the Secretary of the Interior who has responsibility for the power production at those dams, and that same Secretary executed the consumptive use water contracts involved in this case.

E. The environmental statutes do not transfer the Secretary's control of stored water to the Federal Power Commission.

It is argued that unnamed "protections and opportunities" to mitigate environmental impact are available "only before the FPC," not the Secretary of the Interior, and that "there is an obvious disparity in the remedies available in the event of an unfavorable decision." (Opp. Br. 90.)

Unless the FPC had licensing authority in the first place, all this, even if true, would be irrelevant.

But it is a curiously blindfolded argument. In plain sight is the whole spectrum of laws for the protection of the environment,[22] all applicable equally to control the actions and decisions of all federal agencies. The Environmental Protection Agency, for example, has promulgated regulations on the very subject with which complainants express their concern, the effect of steam plant operations on quality of water. See EPA, Thermal Discharges, 40 C.F.R. ch. 40, Part 122, 39 Fed. Reg. 36176, Oct. 8, 1974; EPA, Steam Electric Power Generating Point Source Category:

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[22] *E.g.*, the Clean Air Act, 42 U.S.C. 1857; the Federal Water Pollution Control Act of 1972, 33 U.S.C. 1251; the National Environmental Policy Act, 42 U.S.C. 4321.

Effluent Guidelines and Standards, 40 C.F.R. ch. 1, Part 423, 39 Fed. Reg. 36186, Oct. 8, 1974.[23] See also additional regulations proposed by EPA, Steam Electric Power Generating Source Category: Proposed Effluent Guidelines and Standards for Incompatible Pollutants, 39 Fed. Reg. 36210, Oct. 8, 1974.

Congress repeatedly, most recently in the Colorado River Basin Salinity Control Act, Pub. L. No. 93-320, 88 Stat. 266, 7 U.S. CODE CONG. AND ADMIN. NEWS 1685 (Aug. 15, 1974), has charged the Secretary, not the Commission, with authority and responsibility for solving the salinity problem in cooperation with the Environmental Protection Agency.[24]

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[23] See the detailed supporting paper, EPA, DEVELOPMENT DOCUMENT FOR PROPOSED EFFLUENT LIMITATION GUIDELINES AND NEW SOURCE PERFORMANCE STANDARDS FOR THE STEAM ELECTRIC POWER GENERATING POINT SOURCE CATEGORY. This contains useful descriptions of the functions and environmental effects of cooling water, particularly in the discussions at 255, 275, and 313-451.

It must not be thought that the environmental consequences of the six plants are not presently regulated. Under the provisions of the water service contracts for these plants, for example, the Secretary of the Interior must review and approve the various systems which have an impact on the environment. These contracts are on file with the Clerk of the Court.

[24] The Environmental Protection Agency, in collaboration with the Secretary and the States, has formulated and published in the Federal Register, 39 Fed. Reg. 43721 (Dec. 18, 1974), a "salinity control policy and procedures and requirements for establishing water quality standards for salinity and a plan of implementation for salinity control in the Colorado River System . . .", looking toward adoption of water quality standards by 1975. It provides that: "(ii) The salinity problem shall be treated as a basinwide problem that needs to be solved in order to maintain lower main stem salinity at or below 1972 levels while the basin States continue to develop their compact-apportioned waters.

"(iii) The goal of the plan shall be to achieve compliance with the adopted standards by July 1, 1983 . . . ."

The Sierra Club had objected to paragraph (ii) among others.

VI. THERE IS NO SUPPORT FOR THE NOTION THAT THE SURPLUS WATER CLAUSE WAS INTENDED TO BRING STEAM PLANTS INTO THE FPC'S LICENSING JURISDICTION, UNANNOUNCED, BY THE BACK DOOR.

As to the "surplus water" clause, considered independently of the superseding effect of the Colorado River legislation:

The opposing argument (Opp. Br. 59) is that all hydroelectric projects are located on streams deemed navigable waters of the United States(Opp. Br. 61), hence require "project workers licenses" anyhow, whether or not using water from government dams; therefore "the surplus water clause can have independent significance only if construed to cover facilities other than hydro plants"[25] (Opp. Br. 61); this, by subtraction, means steam plants, even though the Act and its legislative history contain no hint of this, and complainants believe that "Congress was not thinking about steam plants at all" (Opp. Br. 26).

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[25] Use of surplus water from government dams was not, as the complainants imply, a little understood concept, or a jurisdictional "catch all" for non hydroelectric uses of surplus water. Congress' concern in enacting the Federal Water Power Act was the encouragement of hydro power development, either by private interests constructing hydro projects, or utilization of existing or future government dams. Congressman Sims explained this situation:

> "It takes time, and it takes a long time, to build a tremendous dam. A water-power dam in some places, on some watercourses, is estimated to cost as high as $25,000,000. But there are a number of Government dams, navigation dams, *dams that have been built on navigable rivers* for the purpose of improving navigation, that are now unavailable simply because there is no law that permits their utilization. Those dams, or *the water produced by Government navigation dams*, can be made available immediately . . . ." 56 CONG. REC. 8929 (1918). (Emphasis added.)

There are several answers:

The legislative history shows that the surplus power or water clause was intended to be equally applicable to hydro plants located at government dams *on navigable and non-navigable streams.* Payment for the privilege of using surplus water created by government dams (as opposed to power created by private dams) was a crucial factor underlying the surplus water provision. The debates show a logical distinction between the amounts that a licensee ought to pay the United States if he built the dam that creates the power head, and the additional amounts that he ought to pay if he is allowed to make use of the head (and the flow of water) made available by construction of a government dam at federal expense (usually spoken of as a navigation dam, in the debates).[20]

As most (but not all) government dams were on navigable streams, the surplus power or water clause was of course intended to apply to hydro projects making use of navigable waters. *Ford* v. *Little Falls Fibre Co.*, 280 U.S. 369, 374 (1929), is an illuminating example.

The Court described the license as follows:

> ". . . The petitioner, a private business corporation, has procured from the Federal Power Commission a license for a hydroelectric power project, purporting to be granted under the Federal Water Power Act of June 10, 1920, 41 Stat. at L. 1063

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[20] *E.g.*, 56 Cong. Rec. 9912-13 (1918); 58 Cong. Rec. 2037, 2221-23 (1919); 59 Cong. Rec. 246 (1917).

[U.S.C. title 16, § 792]. *The license granted permission to use surplus water from the Federal dam for the development of power at a plant to be constructed and maintained by petitioner for that purpose on government land.* As the license also permits, but does not require, petitioner has placed flashboards on the crest of the dam, which, under normal conditions, raise the level of the water in the pool above the dam approximately 2 feet." (Emphasis added.)

The differences in duration and charges in the "project works" component and the "surplus water" component of a license or licenses are stated by the statute itself (Section 10(e)). The Commission's practice accords with the foregoing construction of the Act. It consistently requires[27] that a hydro project using water from a government dam on a navigable stream either obtain two licenses, or one license combining two features: (i) a project works license for 50 years at a set uniform nationwide annual charge, plus (ii) a surplus water license for an initial period of 20 years, renewable, for fees which vary with the quantity of water furnished from the government dam.[28]

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[27] See Appendix B for a list of 17 surplus water licenses issued by the Commission. All relate to waters now classed as navigable waters of the United States, with one possible exception, there noted.

[28] In some instances, as consideration for the use of surplus water at a government dam, the licensee is required to operate and maintain the dam and its hydraulic features. *E.g.*, Potomac Edison Co. of West Virginia, Project No. 2517, 35 F.P.C. 680, 681 (1966); Potomac Edison Co. of West Virginia, Project No. 2516, 35 F.P.C. 676, 677 (1966).

In short, the complainants are quite mistaken in their major premise, that the surplus water clause has no applicability to hydro projects on navigable streams, and are thus mistaken in their conclusion that this clause must have been meant to apply only to non-hydro projects on such streams, *e.g.*, steam plants.

As to power plants which do *not* use the head developed by a government dam, but are located downstream in a reach whose flow is affected by the upstream dam, complainants can cite no legislative history which would support a jurisdictional claim, even with reference to a hydro plant. The only case which has considered this question, *California Oregon Power Co.* v. *FPC*, 239 F.2d 426 (D.C. Cir. 1956), rejected the Commission's conclusion that a surplus water license was required.[29] Our opponents quote the Commission but not the Court (Opp. Br. 59).

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[29] The court held that no justiciable controversy over the meaning of "surplus water" was presented, inasmuch as a project works license was required in any event because of the plants' locations on a navigable stream. It said (p. 431): "The Commission has not ruled with clarity on what it considers 'surplus water' to be, or in any event what amount of it will be used by Copco, or when (if ever) Copco is to be charged for it, or at what rate."

P. 432: "The record is, in fact, in such a state that we could hardly hold (if we reached the question) that Copco has been shown to be a user of surplus water, on any theory."

CONCLUSION

We submit that:

1. The licensing jurisdiction of the Federal Power Commission with respect to "project works" is restricted to hydroelectric projects, and excludes steam-electric generating plants.

2. The further question of whether the Commission would have licensing jurisdiction with respect to the consumptive use by steam plants of "surplus water" from a government dam is not required to be decided in this Colorado River case, because here Congress has superseded the "surplus water" license with the requirement of a contract with the Secretary of the Interior for the use of waters of the Colorado River System stored by the government dams involved.

3. If, notwithstanding the superseding effect of the Colorado River statutes, the question were to be reached as to whether the jurisdiction of the Federal Power Commission to license the use of surplus water from a government dam encompasses use of such water by a steam-electric generating plant, the answer should be in the negative.

Respectfully submitted,

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.
Law Offices of Northcutt Ely
Watergate 600 Building
Washington, D. C. 20037
and
HARRY A. POTH, JR.
PEYTON G. BOWMAN, 3RD
Reid & Priest
40 Wall Street, New York,
New York 10005

1701 K Street, N. W.
Washington, D. C. 20006
Attorneys for all Petitioners

NICHOLAS H. POWELL
Snell & Wilmer
400 Security Building
Phoenix, Arizona 85004
Attorneys for Arizona Public Service Company

WILLIAM DUNCAN
Kemp, Smith, White, Duncan & Hammond
P. O. Box 2800
El Paso, Texas 79999
Attorneys for El Paso Electric Company

BURT S. PINES, City Attorney
EDWARD C. FARRELL, Chief
Assistant City Attorney for
Water and Power

RALPH GUY WESSON
Assistant City Attorney
111 North Hope Street
Los Angeles, California 90051
Attorneys for Department of Water and Power, City of Los Angeles

M. GENE MATTEUCCI
P. O. Box 230
Las Vegas, Nevada 89101
Attorney for Nevada Power Company

REX E. LEE
2840 Iroquois Drive
Provo, Utah 84601
Jennings, Strouss & Salmon
111 W. Monroe Street
Phoenix, Arizona 85003
Attorneys for Salt River Project Agricultural Improvement and Power District

SHERMAN CHICKERING
C. HAYDEN AMES
EDWARD P. NELSEN
ALLAN J. THOMPSON
Chickering & Gregory
111 Sutter Street
San Francisco, California 94104
Attorneys for San Diego Gas & Electric Company

JOHN R. BURY
Assistant General Counsel
P. O. Box 800
Rosemead, California 91770
Attorney for Southern California Edison Company

L. V. ROBERTSON, JR.
General Attorney
Tucson Gas and Electric Company
220 West Sixth Street
Tucson, Arizona 85703

DONALD E. DICKERMAN
Holesapple, Conner, Jones, McFall & Johnson
P.O. Box 310
Tucson, Arizona 85702
Attorneys for Tucson Gas & Electric Company

SIDNEY G. BAUCOM
ROBERT GORDON
P.O. Box 899
Salt Lake City, Utah 84110
Attorneys for Utah Power & Light Company

APPENDIX A

Reports of the Secretary of the Interior made pursuant to congressional authorization for comprehensive planning for the use of the water and related resources of the Colorado River Basin.

1. U.S. Department of the Interior, A Report on the Colorado River Storage Project and Participating Projects, Providing for the Development and Utilization of the Water and Related Resources of the Upper Colorado River Basin, Pursuant to the Federal Reclamation Laws (1954).

2. U.S. Department of the Interior, Quality of Water: Colorado River Basin (1963, 1965, 1967, 1969, 1971, 1973).

3. U.S. Department of the Interior, Pacific Southwest Water Plan (1964).

4. U.S. Department of the Interior, Upper Colorado River Basin Cooperative Salinity Control Study (1969).

5. Water Resources Council, Lower Colorado Region Comprehensive Framework Study (1971).

6. Water Resources Council, Upper Colorado Region Comprehensive Framework Study (1971).

7. U.S. Department of the Interior, Southwest Energy Study: An Evaluation of Coal-Fired Electric Power Generation in the Southwest (1972).

8. U.S. Department of the Interior, Water Quality Improvement Program (1972).

9. U.S. Department of the Interior, Alternative Sources of Water for Prototype Oil Shale Development: Colorado and Utah (Draft) (1974).

10. U.S. Department of the Interior, Report on Water for Energy in the Upper Colorado River Basin (1974).

11. U.S. Department of the Interior, Westwide Study Report on the Critical Water Problems Facing the Eleven Western States (Draft) (1974).

APPENDIX B

Examples of Licenses for the Use of Surplus Water from Government Dams on Navigable Waters of the United States

1. John Hollis Bankhead Dam on the Black Warrior River, Project No. 2165, *Alabama Power Company*, 18 F.P.C. 327 (1957); 34 F.P.C. 971 (1965) (order fixing annual charges for use of government dam—$92,000 annually); 36 F.P.C. 658 (1966) (method used in setting annual charges for use of government dam).

2. United States Holt Lock and Dam on the Black Warrior River, Project No. 2203, *Alabama Power Company*, 34 F.P.C. 1108 (1965).

3. United States Dam No. 4 Hydro Station on the Potomac River, Project No. 2516, *Potomac Edison Co. of West Virginia*, 35 F.P.C. 676 (1966); 41 F.P.C. 194 (1969).

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17. Racine River Dam, Project No. 2570, Ohio Power Company, license issued on December 27, 1973.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1666

ARIZONA PUBLIC SERVICE COMPANY, ET AL.

v.

CHEMEHUEVI TRIBE, ET AL.

No. 73-1667

FEDERAL POWER COMMISSION

v.

CHEMEHUEVI TRIBE, ET AL.

BRIEF OF AMERICAN PUBLIC POWER ASSOCIATION AMICUS CURIAE

FRANK WILLIAM FRISK, JR.
Attorney for
American Public Power Association
Suite 212
2600 Virginia Ave., N.W.
Washington, D.C. 20037

August 9, 1974

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BRIEF OF AMERICAN PUBLIC POWER ASSOCIATION AMICUS CURIAE

The American Public Power Association (APPA) supports the arguments made in the briefs of the Solicitor General and the Arizona Public Service Company, et al.

APPA has received the consent of counsel for all parties to file this brief amicus curiae in accordance with Rule 42 of this Court.

INTEREST OF THE AMICUS CURIAE

The American Public Power Association is composed of some 1,400 consumer-owned electric utilities in 48 states, Puerto Rico, American Samoa, the Virgin Islands, and Guam. The members are State power authorities, public utility districts, cooperatives, but primarily municipalities. The municipally owned and operated utilities, divisions of city governments, range in size from the Cities of Los Angeles, Seattle and Jacksonville, Florida, to small villages like Elbow Lake, which played a central role in the *Otter Tail* case. *United States* v. *Otter Tail Power and Light Co.*, 410 U.S. 366 (1973).

The number of fossil-fuel power plants operated by publicly owned electric utilities reported to the Federal Power Commission in 1971 was 363, which constituted a total installed capacity of 21,108,410 kilowatts.[1] It is anticipated that the installed capacity of these non-profit utilities will more than quadruple by 1990. In addition, some members are constructing, or are planning, nuclear generating units. Other members rely on wholesale purchases of power from other utilities. The court of appeals decision, therefore, has a direct effect on these public agencies.

All fossil-fuel power plants use water in their boilers, and, as is the case with nuclear plants, use water in their cooling operations. In many instances, the water is taken from "navigable waters," and, in some cases, water is taken from reaches of streams where the

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[1] FPC, STATISTICS OF PUBLICLY OWNED ELECTRIC UTILITIES—1971, Table 7, at XIV (1972).

regimen is affected by upstream government dams. The court of appeals deemed the latter to be use of "surplus water" from a government dam which requires a license from the Federal Power Commission pursuant to Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e). We believe the court's conclusion to be in error, and seriously detrimental to the interests of local publicly owned electric utilities.

ARGUMENT

The court of appeals said (App. 92-93):

> "In this age of pervasive federal regulation and of heightened awareness of environmental considerations, it is difficult to comprehend that there should be no federal agency or policy governing the siting and operations of fossil-fueled steam plants."

There is room for legitimate disagreement as to whether there should be such steam-plant legislation, or what it should say, or what agency should be charged with its administration. It seems clear that Congress did not resolve any of these questions 54 years ago when it enacted the Federal Water Power Act. Indeed, as the court said a few pages earlier (App. 90):

> "Steam plants were purposely omitted from the Congressional scheme and we cannot rewrite the statute to correct what may have been legislative shortsightedness."

And so, the court, in dismissing the complainants' arguments that thermal electric plants are "project works" under section 4(e), suggested that such argu-

ments "would be better addressed to the Congress" (App. 97). We agree.[2]

This logic would seem to apply to steam plants using water from government dams as fully as it does to steam plants using water from navigable streams. If new federal legislation is required to give the Federal Power Commission jurisdiction in the latter case (and we agree that it is), new federal legislation is logically required to give it jurisdiction in the former case, the court of appeals decision to the contrary notwithstanding.

We do not find in Part I of the Federal Power Act, enacted originally as the Federal Water Power Act, any criteria whatever to guide the Commission in licensing either class of steam plant, or its administration of such licenses once they were granted.

To name only a few problems suggested by the Act's provisions relating to hydroelectric projects: What would constitute the "project" and "project works," under Section 3, 16 U.S.C. § 796(11), (12)—the water diversion facilities or the whole generating plant? The

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[2] Congress has been considering, during the past several years, various legislative proposals which would extend federal regulatory jurisdiction over the siting of steam electric plants. Unlike Part I of the Federal Power Act, many of these bills are founded upon the principle that State governments should have a major role in the decision-making on siting. This principle would keep intact existing power plant legislation in many states. Some of the bills grant FPC authority as the responsible federal agency by adding a Part IV to the Act. The various views on siting can be found in: *Powerplant Siting and Environmental Protection, Hearings Before the Subcomm. on Communications and Power, House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. (1971). Examples of pending bills are: H.R. 180, H.R. 2374, H.R. 359, H.R. 4874, H.R. 5278, H.R. 13484, H.R. 13204, and S. 935.

power plant may be several miles from the stream. The Act's definitions of "project" and "project works" are wholly foreign to the components of a steam plant. Would the preference right of public agencies under Section 7 (19 U.S.C. § 800) apply? Would the preliminary permit provisions of Section 4 (e) (16 U.S.C. § 797(e)) and Section 5 (16 U.S.C. § 798) be applicable? What would be the duration of such a license? The Act specifies a period not exceeding 50 years (Sec. 6, 16 U.S.C. § 799), and this is the usual term related to the long life of hydroelectric projects. But the normal life of a thermal plant is of the order of 30 to 35 years. Would the plant be subject to recapture by the United States, as a hydroelectric facility is, at the end of the license period (Sec. 14, 16 U.S.C. § 807)? Could the licensee exercise the powers of eminent domain granted by the Act to licensees of hydroelectric projects (Sec. 21, 16 U.S.C. § 814)?

Any commission charged with the responsibility for licensing steam plants would need an entirely different set of statutory criteria and guidelines.

The decision below raises serious questions as to the States' licensing authority over steam plants located below government dams. Such authority is widely exercised. The Commission's licensing authority over hydroelectric projects is exclusive, in consequence of preemption by Congress in the Federal Power Act, of regulation of the use of navigable waters. If this preemption is deemed to extend to the licensing of steam plants (whether because they are using navigable waters or because they are using water supplied from government dams), presumably the States are ex-

cluded from the field that they now occupy. If so, the consequence is a vacuum, because, as noted earlier, there are no adequate criteria at all in the Federal Power Act to govern steam plant licensing.

As an organization concerned with effective power plant siting legislation, we believe that comprehensive legislation, not the silence of the Federal Power Act, on the subject of steam plants, is essential, and that the prospect of attaining that goal will be seriously handicapped if those not favorable to progress in this field are enabled to argue that this whole subject was fossilized, *sub silento,* a half-century ago, by legislation that made no mention of it.

CONCLUSION

For these reasons, we ask that the Court sustain the court of appeals holding on the "project works" clause of Section 4(e) of the Federal Power Act, and reverse that court's inconsistent holding on the surplus water clause of that section.

Respectfully submitted,

FRANK WILLIAM FRISK, JR.
Suite 212
2600 Virginia Ave., N.W.
Washington, D.C. 20037
Attorney for
American Public Power
Association

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Respondent

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NO. 73–1667

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THE CHEMEHUEVI TRIBE OF INDIANS, *ET AL.*
Respondents

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief for the Electric and Water Plant Board of Frankfort, Kentucky; The Municipal Light Department of Wakefield, Massachusetts; and The Northern California Power Agency, as Amici Curiae

Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

ROBERT C. McDIARMID
FRANCES E. FRANCIS
PETER K. MATT
DANIEL J. GUTTMAN

Attorneys for: The Electric and Water Plant Board of Frankfort, Kentucky; The Municipal Light Department of Wakefield, Massachusetts; and The Northern California Power Agency.

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Brief for the Electric and Water Plant Board of Frankfort, Kentucky; The Municipal Light Department of Wakefield, Massachusetts; and The Northern California Power Agency, as Amici Curiae

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STATEMENT OF INTEREST

The Electric and Water Plant Board of Frankfort, Kentucky; the Municipal Light Department of Wakefield, Massachusetts; and the Northern California Power Agency,

including the Cities of Santa Clara, Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, and Ukiah, California; and the Plumas-Sierra Rural Electric Cooperative ("Cities" or "Amici") are all small electric systems distributing or whose members distribute to their consumers electricity purchased wholly or in part from public utilities under the Federal Power Act.

The Cities' interest in this proceeding stems from the applicability of the conditioning authority exercised by the Federal Power Commission ("FPC" or "Commission") under its Part I licensing provisions. This conditioning authority includes matters relating to antitrust, access to transmission and generation, the environment and other beneficial public purposes. Presently, steam plants producing electricity are not regulated by the Commission. As we demonstrate steam plants located on or affecting the navigable waters of the United States are subject to FPC jurisdiction under Part I, and the FPC should have the opportunity to provide for the economically rational construction and operation of generation plants utilizing these waters for the benefit of consumers furnished power by all segments of the industry.

SUMMARY OF ARGUMENT

Part I of the Federal Power Act extends to steam plants affecting navigable waters or interstate commerce, since the primary legislative objective of Part I was to assure the best plan for the comprehensive development of the nation's water resources. The court below erred in concluding that Part I was intended to be limited to hydroelectric projects and that steam plants were specifically excluded under Part I because Congress had not provided for the regulation of the electric power industry under Part I. Congress could not have foreseen the magnitude of the

use and hence the impact upon the nation's waterways by steam plants for cooling water purposes.

The public interest in the Commission's assertion of jurisdiction lies in the Commission's licensing authority and includes consideration of items as diverse as antitrust, the environment, and more economically priced electricity for the consumers of the nation's pluralistic electric industry. Moreover, such conditioning is fully consistent with the Commission's authority and responsibilities under Part II of the Act. Finally, the decision of the court below should be upheld as to the surplus water clause since its analysis rests properly on the broad considerations Congress set forth as the objectives for the Commission under Part I of the Act.

ARGUMENT

I.

THE COURT BELOW ERRED IN ITS CONCLUSION THAT THE FULFILLMENT OF THE COMMISSION'S MANDATE UNDER THE FEDERAL POWER ACT DOES NOT REQUIRE THE ASSERTION OF JURISDICTION BY THE COMMISSION OVER STEAM ELECTRIC PLANTS AFFECTING INTERSTATE COMMERCE OR NAVIGABLE WATERS.

A. Part I of the Federal Power Act Gives the Commission a Broad Mandate to Regulate the Use of the Nation's Waterways in the Public Interest.

In supporting its denial of the Petitioners' argument

that the Commission should license and regulate the steam plants, in issue the court below stated:

> "The 1920 Act thus did not direct the FPC to regulate broadly the Nation's electric power industry or its major waterways, and we cannot conclude that recognizing Commission jurisdiction over steam plants is essential to fulfillment of the agency's congressional mandate."[1]

What the court below overlooked is that the 1920 Act did indeed grant to the Commission a broad mandate to "secure Commission control over all projects involving the development of the Nation's water resources."[2] Section 10(a) of Part I of the Act, 16 U.S.C. 803(a), specifically provides that "***all*** licenses issued under this Part shall be on the following conditions:

> (a) That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

In discussing the history of Part I of the Federal Power Act, Gifford Pinchot cites a letter by President Theodore Roosevelt to the members of the Inland Waterways Commission as indicative of the thinking that led to Part I of the Act.[3] The letter, in part, states:

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[1] ***Chemehuevi Tribe of Indians*** v. ***Federal Power Commission***, 489 F.2d 1207 (D.C. Cir. 1973) at 1231.

[2] Senate Report To Accompany S. 2976, Public Utility Act of 1935, S. Rep. No. 621, 74th Cong., 1st Sess. The 1920 Act become Part I of the Federal Power Act.

[3] Pinchot, "The Long Struggle for Effective Federal Water Power Legislation," 14 Geo. Wash. L. Rev. 9 (1945) 15, 16.

> "Works designed to control our waterways have thus far usually been undertaken for a single purpose, such as the improvement of navigation, the development of power, the irrigation of arid lands, the protection of lowlands from floods, or to supply water for domestic and manufacturing purposes. While the rights of the people to these and similar uses of water must be respected, the time has come for merging local projects and uses of the inland waters in a comprehensive plan designed for the benefit of the entire country. Such a plan should consider and include all the uses to which streams may be put, and should bring together and coordinate the points of view of all users of waters." (Footnote omitted)[4]

Pinchot further notes that the report of the Inland Waterways Commission, which was the basis for Part I, "was based on two fundamentally important principles . . .:

> First, that every river system is a unit from its source to its mouth and should be treated as such.
>
> Second, that plans for ***any use*** of our inland waterways should 'take account of the purification of the waters, the development of power, the control of floods, the reclamation of lands by irrigation and drainage, and all other uses of the waters or benefits to be derived from their control." (Footnote omitted)[5] (emphasis added)

The Congressional emphasis on Part I as guiding the development of the nation's water resources is underscored by the amendment made to Part I in 1935. The Senate Report explaining an amendment to Part I in 1935 stated:

> "The present definition of 'corporation' limits the use of that term to corporations authorized to develop, transmit, distribute, sell, lease or utilize electric power. A broader definition is substituted to make that term embrace all corporations,

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[4] *Id.*, at 15.

[5] *Id.* at 15, 16.

> ***whether dealing in electricity or not***, and also to include unincorporated forms of organization other than an individual business. This broader use of the term is more useful than that of the present act. . ." (emphasis added)[6]

In reviewing the Commission's authority under Part I, the courts have emphasized the Commission's duty to protect the Nation's water resources. Thus, in ***Municipal Electric Ass'n. of Mass.*** v. ***Federal Power Commission***, 414 F.2d 1206 (D.C. Cir. 1969), at 1207, the court stated:

> "The Commission is empowered to license power projects utilizing the navigable waters of the United States. (Footnote omitted) This is not a small power or one to be exercised lightly. The nation's rivers are among its greatest economic resources and natural treasures. A license to construct a power project using a river authorizes the licensee 'to appropriate water resources from the public domain.' ***Udall*** v. ***F.P.C.***, 387 U.S. 428 . . . (1967)."

It would thus appear clear that the 1920 Act focused on the waterway, as did the 1935 amendments to the 1920 Act, and Congress gave the Commission the primary function to license projects that in any way affected the development of the nation's water resources as encompassed by a physical waterway and individuals requiring licenses were not necessarily electric utilities.

Later Commission opinions and actions support the position that the Commission has not exclusively focused on hydro power development to the exclusion of the public interest in the multiple development of the nation's waterways. Hence, in ***Arkansas Power and Light Co.***, 40 F.P.C. 522 (1968), the Commission specifically provided for the use of a federally-licensed reservoir in connection with cooling water for steam power plants.[7] In ***Rumford Falls***, the Commission also evidenced a concern for the best use of

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[6] S. Rep. No. 621, 74th Cong., 1st Sess., at p. 42.

[7] Also see ***Brazos River Authority***, 34 F.P.C. 1507 (1965) and ***Duke Power Co.***, 36 F.P.C. 675 (1966).

the water resources in the public interest, conceivably even to the extent of switching the use of a power project to another beneficial use completely, subject to proper compensation.[8]

As this Court stated, in ***Federal Power Commission*** v. ***Union Electric Co.***, 381 U.S. 90 (1965), at 98, 99:

> "The central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and very prominently, hydroelectric power – uses which, while unregulated, might well be contradictory rather than harmonious. (Footnote omitted)
>
> * * *
>
> "As this Court has had occasion to note before, the 1920 Federal Water Power Act 'was the growth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, ***insofar as it was within the reach of the federal power to do so***. . . .'"

Statutory language thus charging the Commission with the duty to oversee comprehensive development of the Nation's waterways can hardly be called a niggardly grant of power, and the court below was in error in stating that the 1920 Act did not direct the FPC to regulate broadly the Nation's major waterways.

The court further erred when it held that the absence of a Congressional mandate to regulate broadly the Nation's electric power industry ***under Part I*** was grounds for denying the Commission jurisdiction over steam plants. Part II of the Act determines the scope of the Commission's authority

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[8]See ***Rumford Falls Power Co.*** v. ***Federal Power Commission,*** 355 F.2d 683 (1st Cir. 1966), and Memorandum Opinion on Remand, ***Rumford Falls Power Co.,*** Project No. 2333, 36 F.P.C. 605 (1966).

over the electric power industry, and insasmuch as Congress did not enact Part II until 1935, it clearly did not make the Commission's Part I jurisdiction contingent upon Commission jurisdiction of the electric power industry. Accordingly, the only relevant test of jurisdiction under Part I is whether the 1920 Act gave the Commission a broad mandate to regulate the Nation's waterways, and this Court's language in ***Union Electric***, ***supra***, resolves this in favor of Commission jurisdiction over the waterways.

B. The Court Erred in its Conclusion that Part I of the Act Specifically Excluded Licensing of Steam Plants Affecting Jurisdictional Waters.

The court below rejected the Petitioner's argument that steam plants could be included under the framework of Part I of the Act in the following way:

1. "... most of the electric power produced in this country at the time the Act was passed was generated by water-cooled steam plants."

2. "... any legislation intended to regulate comprehensively the interrelationship between the production of power and the efficient management of water resources would surely have taken account of the existence of these water-using steam plants."

3. "Congress' failure to do so refutes the argument that the FPC should regard steam plants as an unspecified or unanticipated method of operation whose regulation should now be undertaken as an obvious part of the congressional scheme."

4. "Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness."

The argument is in error, however. It is irrelevant that most of the electricity generated in 1920 was by water-cooled steam plants. As will be discussed, ***infra***, the tech-

nology and magnitude of impact on the waterways were so different in 1920 that water-cooled, steam-generated plants could not reasonably have been anticipated by Congress to affect the navigable waters. Since the development of the waterways, and ***not*** the production of power, was the primary concern of Congress, there is no basis for the court's conclusion that the lack of specific reference to steam generation represents a purposeful omission from the congressional scheme, or that the court is being asked to "rewrite the statute to correct what may have been legislative shortsightedness."[9] A more correct interpretation of Congressional intent is that Congress meant what it said in the statute, namely, that it gave the FPC broad authority to license the use of the waterways to applicants "in the public interest for the use or benefit of interstate or foreign commerce," in light of then-current conditions.

C. A Regulatory Agency Must Take Account of Changes in Technology and Public Policy in Administering Its Statutory Duties.

It is in the nature of a regulatory agency's duties that its tasks are constantly in a state of flux and subject to changes due to developments in technology and changing public priorities and concerns. As this Court stated, in upholding the reversal by the Interstate Commerce Commission of a policy it had "insisted" on for over 25 years,

> "... this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adopt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and future within the inflexible limits of yesterday."[10]

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[9] 489 F.2d at 1231.

[10] ***American Trucking Associations, Inc.*** v. ***Atchison Topeka and Santa Fe Railway Co.***, 387 U.S. 397 (1967) at 416.

The Respondents ("Companies" and "Commission" or "FPC") argue that the various attempts by the Commission to secure a federal power plant siting statute as well as past Commission declarations denying licensing authority over steam generation are dispositive of the jurisdictional issue raised herein. However, attempts by agencies to have Congress clarify their duties are not assumed to be dispositive in jurisdictional matters. Thus, in ***United States*** v. ***Southwestern Cable Co.***, 392 U.S. 157 (1968) at 165, this Court noted the attempts by the Federal Communications Commission to obtain "amendatory legislation" because of its view "that it had not been given plenary authority over 'any and all enterprises which happen to be connected with one of the aspects of communications.' " What was pertinent to this Court in ascertaining the correctness of the Commission's eventual decision to regulate CATV systems was the underlying purpose of the Communications Act, ***i.e.***, to recognize "the rapidly fluctuating factors characteristic of the evaluation of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." (footnote omitted)[11] In the following section, Cities will describe the effect of the steam plants upon the Nation's waterways and their consequences for effective Part I administration of the Nation's waterways by the Commission.

D. The Development of Large Power Plants that Utilize Enormous Amounts of Cooling Water is a Relatively New Technological Development that Merits Assertion of Commission Jurisdiction Under Part I of the Act. The Court Erred in Concluding that Withdrawals for Cooling Purposes Would Not Impinge on the Commission's Licensing Jurisdiction.

Although the court below agreed "that modern steam plants are of a size and efficiency unknown at the time of the passage of the Federal Water Power Act, that they use correspondingly more water for cooling purposes, and that the earlier plants returned most of their cooling waters to the water source instead of evaporating it," it appeared

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[11] ***United States*** v. ***Southwestern Cable Co.***, 392 U.S. 157 (1968), at 172.

distressingly unaware of the impact of those findings upon the comprehensive development of the waterways in the public interest, as required by Part I of the Act. Indeed, the court below erred in its conclusion on p. 1232 that:

> "If the 'power potential in water' is not involved when water is heated to drive a turbine, there would appear to be less warrant to conclude that it is involved when water is used in the post-generation, cooling process. (Footnote omitted) And there would be no warrant to conclude that ***the mere extraction of water, with a consequent decrease in the amount of water available to downstream users for power generation,*** utilizes the 'power potential in water' in a manner impinging on the FPC's licensing jurisdiction." (emphasis added)

The court's reasoning errs in two respects. First, the relevant question determinative of FPC jurisdiction is not the distinction between water being heated to produce steam and water being used to cool the condensors; it is the effects of the extraction and release of the water upon the waterway. Furthermore, the effect is not limited to the concerns of "downstream users for power generation," but to the wider public and the national interests as reflected in the Act.[12] In other words, courts must look not only to whether the extraction of water from jurisdictional waterways affects hydroelectric power generation subject to FPC licensing but whether the use of water for steam plant cooling affects the many other interests encompassed within the Commission's licensing jurisdiction.

Under the Commission's Part I authority, "the Commission has important conservation responsibilities . . . These considerations include the effects of project construction and operation on fish and wildlife resources, scenic and recreational values, provision of minimum flows in the interest of water quality, the health and safety of the

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[12] *Cf.* language in ***Municipal Electric Ass'n. of Mass.*** v. ***Federal Power Commission,*** 414 F.2d 1206 (D.C. Cir. 1969) that "... the statute (*i.e.*, Part I) does not merely require that the license suit the public interest, or be appropriate, but in effect imposes a 'highest and best use' standard."

public, and the effect that steam generation plants and other industrial users will have on the thermal and chemical properties of the project waters."[13] In his testimony, the Chairman of the Commission noted that the Commission has conditioned the use of FPC-licensed reservoirs for the use of cooling water for steam plants and recognized the effects of projects on fish and recreational resources[14] as well as other environmental effects. He further noted that the Commission had, in 1969, "about 40 technical staff members who spend some or all of their time in one or more aspects of environmental analysis."[15]

Apart from the Commission's growing role in monitoring and regulating the use of waters for cooling steam electric plants, the magnitude of the power industry's consumption of the nation's available water resources has only recently been examined and categorized. Thus, the Commission's ***1970 National Power Survey*** reported:

> "The electric power industry relies heavily on the nation's water resources. It uses but does not consume approximately four-fifths of the total water used by all industry for cooling purposes. It also accounts for nearly one-third of the total water uses for all purposes. The power industry's use of water (as coolant but not for consumption) is expected to increase substantially along with the nearly quadrupled scale-up of power generation in the next two decades."[16]

The following excerpt from the Statement of Carl Klein, Assistant Secretary for Water Quality Research, Department of the Interior, is also illuminating:[17]

> "Thermal pollution is of major concern because of its burgeoning impact on the environment now and in the foreseeable future. Many recent

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[13] Testimony of John N. Nassikas, Chairman, Federal Power Commission, Hearings before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess., Part I, p. 39 (1969). [Hereinafter referred to as "Hearings"].

[14] ***Ibid.***

[15] ***Id.***, at pp. 39, 40.

[16] Federal Power Commission, ***The 1970 National Power Survey***, Part I, p. I-1-25 (1971).

[17] "Hearings" at p. 291.

analyses show a doubling of electrical needs in the United States every 10 years and, in some areas, as little as every 6 years.

"The electric power industry uses about 70 percent of all the water taken in by industry which is used for the sole purpose of dissipating waste heat.

"Other sources of thermal pollution exist, of course, but their impact upon the environment is only one-fifth that of the electric power industry.

"At present, about 81 percent of the generating capacity of the United States comes from thermal generating plants – both fossil fueled and nuclear.

* * *

"It has been repeatedly pointed out, even as late as this past week, by Charles F. Luce, former Under Secretary of the Department of the Interior and presently chairman of the board of Consolidated Edison of New York, that, by 1980, electrical power needs will require the use of one-sixth of the total available fresh water runoff in the entire Nation for cooling purposes.

"Now, if we discount flood flows . . ., it becomes apparent that the power industry will require about half the total runoff for the remaining two-thirds of the years.

"More recent projections of the waste heat load by the year 2000, which take into account probable technical improvements, indicate that ***the requirement for cooling water will equal two-thirds of the total national daily runoff of 1,200 billion gallons.***" (emphasis added)

The effects of such large-scale usage of the Nation's water resources are not merely those of diverting water. There are deleterious effects on the water from being heated and passed through the condensors, for example, the

capacity of the stream to assimilate other wastes is decreased and the life cycle of aquatic organisms may be so disrupted as to change the natural condition of the river.[18] Moreover, the availability of cooling water directly influences the fuel mix and supply of electricity, especially in the Southwest. The Task Force on Fuels prepared a report on "Energy Supply and Demand for the West Region" for the ***1970 National Power Survey*** that detailed the interrelationships between water supplies for cooling, fuel mixes for power generation, and the supply of electricity in the West Region, an area comprising the western states, and encompassing the specific plants noted in the present case.[19] The Task Force report concluded that "[w]hile it is well known that the potential western area coal resources are vastly greater than the water supplies needed for development, the seriousness of the water limitation is less well known and continues to be misunderstood."[20] Some of the misunderstanding was attributed by the Task Force to "the recurrence of a persistent fallacy . . . that once-through cooling is not a consumptive use of water."[21] It is a fact that practically all processes to cool the heated water result in some evaporation, or a permanent loss in the amount of water returned by the plant.[22]

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[18]"Hearings", p. 293.

[19]See Appendix 2, "Energy Supply and Demand for the West Region," prepared by Task Force on Fuels (Subcommittee on Generation), ***The 1970 National Power Survey***, Part III, pp. III-3-44 to III-3-119.

[20]At p. III-3-66.

[21]***Ibid.***

[22]See, for example, the following from "Problems in Disposal of Waste Heat From Steam-Electric Plants," Bureau of Power, Federal Power Commission (1969), at p. 37:

> "The consumptive uses of condensing water supplies depend principally upon the type of cooling system. For once-through systems using rivers, lakes, and reservoirs as sources, the losses, due primarily to induced evaporation in the receiving waters, would be one percent or less of the condenser flows. With cooling ponds the losses are of the order of one-half percent or more of the condenser flows. With evaporative cooling towers, the losses for evaporation, windage, and blowdown would probably be two percent or more of the condenser flows."

Moreover, the use of cooling waters for the large, steam plant complexes represented in this case is not a simple case of extracting water, as the lower court appeared to view it. It is, instead, a complicated matter of drawing water in a manner that will not affect other downstream users of waters and returning it in a manner that will not adversely affect other downstream interests or the environmental and other considerations included in a best plan for comprehensive development. Whether such extraction and return can be accomplished economically depends on whether technology is available to prevent, for example, the combination of steam being expelled into the air from the cooling process with other elements to form a harmful vapor (like sulfuric acid) that will return to the water and contaminate it for downstream users, or kill the fish in the waters; on whether the local fish and wildlife are equipped to handle the kinds of disequilibrium presented by the operation of the plant and the installed intake and outtake equipment; whether ground water is available to augment the waters being returned to the river; and whether any authority can compel the best use of both land and water resources to minimize adverse impacts of both construction and operation of the steam plants upon the waterway. The above list is only a partial list of the many considerations affecting the operation of a large steam plant complex. Another obvious consideration that could well affect a downstream hydroelectric project is the ***timing*** of the withdrawals and returns of water by the steam plant. As hydroelectric projects are increasingly becoming valued for their peaking capability in the interconnected grid system, their ability to time their use to maximize the system's use of their power depends on certain assurances about the availability of water when it is called upon. Unless these considerations are raised early in the planning stage of a steam plant complex, there is no assurance to the downstream hydro operator that the steam plant's operations will not detrimentally affect the hydro operations, and also the ability to meet conditions affecting environmental protection that the hydroelectric operator assumed under its FPC license.

The cumulative impact of rapid growth in electricity demand with the development of enormous generators, often located in large electric generation "parks" and requiring very large volumes of water, could simply not have been foreseen by Congress. Nevertheless, the problem is here, and has now become so significant that it poses a definite threat to the best development of our Nation's waterways. Plants drawing vast amounts of water from jurisdictional waterways, consuming, in part, and polluting in part; and affecting, for better or worse, the environment, the supply of electricity in interstate commerce, the fuel mix available for electricity generation with all its ramifications for the environment and the economy, surely are not insignificant developments that the FPC can ignore, given its broad mandate. Affirmative Commission action is especially appropriate where Congress has not excluded steam plants specifically from Part I licensing and could not reasonably have been expected to foresee the course of technological development in the production of electricity upon the use of the Nation's waterways.

E. The Failure of The FPC to Assert Jurisdiction Over Steam Plants is Contrary to the Public Interest Since It Creates a Gap in the Commission's Regulatory Duties Significant Enough to Undermine Its Primary Statutory Objective Under Part I and Ignores Other Major National Policies.

The failure of the Commission to assert jurisdiction leaves the entire issue of the development of the waterways in a most unsatisfactory state in terms of the safeguards Congress obviously thought it had authorized under Part I. Although a few states have enacted statutes governing the construction and operation of steam plants, the majority of the states have no legislation whatever. Of those that have legislation, the statutes vary both in their provisions and enforcement.

The impossibility of tying this patchwork of state, federal, and local regulations into national policies relating to the development of the waterways, the Nation's energy priorities, and the concern for the environment are obvious. While an administrative agency may excel at balancing priorities among various goals, it would be hard put to

resolve matters where the question of jurisdiction itself is in issue.

The appropriate limits of any agency's assertion of jurisdiction in carrying out its duties are a matter for judicial review. Nevertheless, where, as here, the failure to assert jurisdiction would undermine the primary charge by Congress to the Commission, the courts have held that the Commission must assume its responsibilities. As this Court stated, where Congress had designed an Act to provide broad authority in the transportation field to the Interstate Commerce Commission, it must be assumed "that the Commission therefore had powers commensurate with that goal."[23] Thus, in *United States* v. *Pennsylvania Railroad Co.*, 323 U.S. 612 (1945), this Court upheld the assertion of jurisdiction by the ICC over "Seatrain" cars to the extent that it required the railroads to interchange their cars with Seatrain cars. The railroads had argued that this new form of transport carriage was not covered by the relevant statute. This Court held, at 323 U.S. 616, that it could not agree with such a narrow reading of the statute that extracted Congressional prohibition through "the absence of specific language." This Court further noted, at 323 U. S. 616, that the "very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out . . . in the light of the Congressional purpose to foster an efficient and fair national transportation system." In *American Trucking*, this Court likewise refused to find prohibition as to a new service, *i.e.*, piggy back service, since the ICC's assertion of jurisdiction reflected "its [the ICC's] judgment in light of current facts as to the proper inter-relationship of several modes of transportation with respect to an important new development."[24] In *Southwestern Cable*, this Court upheld the agency when it acted to extend its jurisdiction over CATV, hitherto in dispute as to jurisdiction, because it found "the likelihood or probability of [CATV's] adverse impact upon potential and existing service has become too substantial to be dismissed . . . CATV competition can have a substantial

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[23] *American Trucking Associations* v. *Atchison, Topeka, and Santa Fe Railway Company*, 387 U.S. 397, 410 (1967).

[24] *Ibid.*

negative effect upon station audience and revenues. . ."[25] In ***Phillips Petroleum Co.*** v. ***Wisconsin***, 347 U.S. 672 (1954), this Court required the Federal Power Commission to assert jurisdiction over producers of natural gas engaged in interstate commerce. This Court emphasized the national concern in regulation of such producers and the "direct and substantial effect on the price paid by the ultimate consumers" because of the prices paid to the producers.[26] Because "the primary aim of the Natural Gas Act" was "[p]rotection of consumers against exploitation at the hands of natural gas companies," this Court refused to construe narrowly the existing statutory language so as to exempt producers from the Commission's jurisdiction.[27] Furthermore, the refusal of the Commission to assert jurisdiction in the present situation would create the sort of "attractive gap" in regulation that this Court, in ***Federal Power Commission*** v. ***Transcontinental Gas Pipeline Corp.***, 365 U.S. 1, 20-22 (1961) and ***California*** v. ***Lo-Vaca Gathering Co.***, 379 U.S. 366, 369-370 (1965) has determined Congress did not intend to leave in the passage of Part II of the Act.

What this line of cases represents is the logical extension of agency jurisdiction where to do otherwise would be to obviate and diminish the agency's ability to carry out its primary objectives. In the case presently before this Court, Petitioners argue that the Commission will no longer be able to control the comprehensive development of the waterway unless it takes jurisdiction over the biggest user of water from the Nation's waterways, *i.e.*, the steam plants. The trend towards monopolization of our water resources for steam plant cooling is not temporary but is fully expected to increase in the future and increase significantly.[28] It is not an exaggeration to say that the development of our major waterways will, for the most part, depend on the extent its waters are used for steam plant cooling purposes. The Commission's avoidance of such jurisdiction is tantamount to an avoidance of its statutory duties and accordingly, should not be permitted.

F. *Taum Sauk* Does Not Support The Court of Appeals' Decision In This Case.

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[25] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) at 165.

[26] 347 U.S. at 672.

[27] *Ibid.*

[28] See pp. 11–13, *infra.*

In the ***Taum Sauk*** case, ***Federal Power Commission*** v. ***Union Electric Company***, 381 U.S. 90 (1965), the issue before this Court was whether the licensing authority of the Commission pursuant to Section 23(b) of the Federal Power Act, 16 U.S.C. 817, was limited to the effect of a proposed pumped storage hydroelectric project on downstream navigability or included the full scope of Congressional authority over interstate commerce. Union Electric proposed to build a pumped storage hydroelectric facility to be located on a non-navigable tributary of a navigable river. The Commission had held that the project would require a license under Section 23(b) as it would (1) transmit power to a number of states, thus affecting interstate commerce and (2) it would affect downstream navigation.[29] The Court of Appeals reversed on the grounds that the only relevant consideration of the Commission under Section 23(b) was the effect of the proposed project on downstream navigation, and there had not been a sufficient showing that the project would have a significant navigation impact.[30] This Court upheld the Commission's decision, holding that Congress had drawn ". . . . upon its full authority under the Commerce Clause . . . "(381 U.S. at 96) in the drafting of Section 23(b), and there was ". . . obviously little merit to the argument that Section 23(b) requires a license when the interests of water commerce are affected but dispenses with the license when other commerce interests are vitally involved."[31]

This Court reviewed the legislative history of Part I of the Federal Power Act, finding that the intended purpose of the Act was to ". . . promote the comprehensive development of the water resources of the Nation . . ." (381 U.S. at 99 quoting ***First Iowa Hydroelectric Coop.*** v. ***Federal Power Commission***, 328 U.S. 152, 180) and that the purpose would be ". . . more fully served if the Commission must . . . consider the impact of the project on the full spectrum of commerce interest." (381 U.S. at 101) This Court, in fashioning its decision, found it necessary to respond to Union Electric's contention that if it were found that under Section 23(b) jurisdiction rested on a project's generation of

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[29] ***Union Electric Co.***, 27 F.P.C. 801.

[30] ***Union Electric Company*** v. ***Federal Power Commission***, 326 F.2d 535 (8th Cir. 1964).

[31] 381 U.S. at 101.

interstate power, there was no logical difference between a hydroelectric plant and a steam plant located on a stream over which Congress has jurisdiction and which generates interstate power. This Court stated:

> "The answer to the conundrum is that unlike Part II of Title II of the Public Utility Act of 1935, under which the Commission regulates various aspects of the sale and transmission of energy in interstate commerce, Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission." (381 U.S. at 110, footnotes omitted)

The court below placed great reliance on this language though recognizing that the question of Commission jurisdiction over generating plants had not been before this Court in ***Taum Sauk*** and that therefore the discussion in the opinion was ***dictum*** only (489 F.2d at 1228). Such reliance is completely misplaced.

In ***Taum Sauk***, this Court was not concerned with the project's effect on navigation. Hence, its distinction between hydroelectric and steam plants rested on the fact that while both hydroelectric and steam plants might produce energy transmitted in interstate commerce, only hydroelectric facilities utilized water resources that were the subject matter of Part I of the Act and the basis of the Commission's licensing jurisdiction. This Court never considered or needed to consider the proposition that steam plants might also utilize so much of a water resource as to affect significantly the development of a waterway with respect to navigation and other beneficial purposes, so as to require a license.

It is shown in this brief that the steam plants which Petitioners contend are subject to Commission jurisdiction will have significant impacts upon jurisdictional waterways and affect potential navigation. Thus, the distinction asserted by the court below based upon ***Taum Sauk*** is not applicable in this case.

In *Taum Sauk*, this Court recognized that Section 23(b) was not limited to only a consideration of downstream navigability (381 U.S. at 98). This case presents a different issue: the steam plants are located on the Colorado River, which is a navigable river within the reach of the interstate commerce clause and the construction and operation of those plants will have a definite effect on that river.

II.

THE PUBLIC INTEREST REQUIRES THAT THE COMMISSION ASSERT ITS LICENSING AUTHORITY OVER STEAM PLANTS THAT AFFECT JURISDICTIONAL WATERS.

Section 4(e) of the Federal Power Act, 16 U.S.C. 799, authorizes the Commission to issue licenses for . . . "project works . . . across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction . . . ***Provided further,*** . . . Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission . . ."[32]

[32] The complete text of Section 4(e) is as follows:

"(e) To issue licenses to citizens of the United States, or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: ***Provided,*** That licenses shall by issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was

The effect of bringing projects within the licensing authority of the Commission has measurably improved the capability of the Commission to cope with the wide range of problems it has had to deal with not only under its comprehensive Part I authority but also with the problems sometimes associated with its Part II jurisdiction over interstate sales and transmission of electricity.

For example, the Commission's licensing proceedings have given the Commission the opportunity to consider items as diverse as

> "water resource development, navigation and safety considerations, provisions prescribing water releases 'for beneficial public uses, including recreational purposes', the construction and maintenance of fish and wildlife facilities, the free use of project

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created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation. ***Provided further,*** That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: ***Provided further,*** That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: ***And provided further,*** That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the provisio of said subsection. [41 Stat. 1065-1066; 49 Stat. 840-841; 61 Stat. 501; 16 U.S.C. 787 (e)]."

> lands and waterways for the maintenance and operation of federal fish and wildlife facilities, the free use of project lands and waterways for the maintenance and operation of recreational facilities and modification of project structures and operations as may be requested by federal and state agencies for recreation, free public access to project waters and land, measures to prevent soil erosion, including revegetation of exposed soil surfaces, disposal of unused timber, brush, refuse and other materials resulting from project operations, and the restoration of streams in case the project is abandoned."[33] (Footnotes omitted).

More important, from the point of view of the smaller electric systems of the country (like the Cities here), the licensing process enables the Commission to scrutinize the effect of the project upon antitrust issues, as is required by Section 10(h) of the Federal Power Act.[34] As here relevant, that Section provides:

> "That combinations, agreements, arrangements, or understandings, expressed or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."

For example, in the ***Northfield Mountain Case, Western Massachusetts Electric Company***, 39 F.P.C. 723, ***affirmed, Municipal Electric Association of Massachusetts v. Federal Power Commission***, 414 F.2d 1206 (D.C. Cir. 1969), the Commission ordered, and the Court of Appeals affirmed, a condition requiring the licensees to make additional capacity from the project available to small electric systems on a nondiscriminatory basis and to provide transmission for such power, 414 F.2d at 1209.

As this Court and lower courts have made abundantly clear, licensing authority such as the FPC possesses under

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[33] Tarlock, Tippy & Francis, "Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions," 45 S. Cal. L. Rev. 502, 518 (1972).

[34] 16 U.S.C. 803(h).

Part I of the Act must be utilized to accomodate the national interest expressed in varying statutory schemes, and "...such an accomodation does not authorize the agency in question to ignore the antitrust laws." ***FMC v. Svenska Amerika Linien***, 390 U.S. 238, 245, n.4 (1968). See also, ***e.g., McLean Trucking Company v. United States***, 321 U.S. 67 79-80 (1944); ***Northern Natural Gas Co.*** v. ***Federal Power Commission***, 399 F.2d 953, 959 (D.C. Cir. 1968).

Too often, a placement of a large steam plant on or affecting navigable streams, will effectively preempt any other electric system (including the smaller ones) in the region from being able to utilize the same stream for their own plants. Part I of the Act was directed against the private monopolization of public resources. The public interest plainly calls, in these days of critical fuel shortage and rampaging inflation, for consideration of the sort the Federal Power Commission is empowered to give under Part I of the Act. Thus, the Commission could provide for a nondiscriminatory utilization of the water here involved (plainly a public resource within the contemplation of the framers of the 1920 Act) in a way that would also provide to all segments of the industry the advantages of the economies of scale, and commensurate total fuel savings of substantial proportions.

The Commission's conditioning authority under Part I, like that under the Natural Gas Act, is plenary. See, ***e.g., United Gas Improvement Co. v. Callery Properties***, 382 U.S. 223 (1965); ***Federal Power Commission v. Sunray DX Oil Co.***, 391 U.S. 9, (1968); ***Atlantic Refining Co. v. PSC of New York***, 360 U.S. 378 (1959). See also, ***Russell v. Farley***, 15 Otto 433, 26 L.Ed. 1060, 1063 (1882); ***Federal Power Commission v. Hunt***, 376 U.S. 515 (1964); ***Texaco v. Federal Power Commission***, 290 F.2d 149 (5th Cir. 1961). Indeed, this Court has affirmed the Commission in its use of its plenary conditioning powers for the benefit of the national interest under Part I. ***E.g., Federal Power Commission v. Idaho Power Co.***, 344 U.S. 17 (1952). Thus, as this Court noted in ***Gulf States Utilities Company v. Federal Power Commission***, 411 U.S. 747 at 760 (1973), the Commission in its conditioning powers should serve "the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings".

This licensing "first line" function authority of the Commission has had considerable practical benefit to the individual regions and to the country. For example, out of the ***Northfield Mountain*** case, ***supra***, and the Commission's regulatory responsibilities under Part I, has grown the New England Power Pool ("NEPOOL"), which provides an opportunity to achieve the benefits of economies of scale and coordinated operation and planning to all members, public and private, big and small. Similarly, out of this Court's decision in ***Gulf States***, ***supra***, grew an agreement between Gulf States and the Cities of Lafayette and Plaquemine that provided for substantial benefits to the customers of both Gulf States and the Cities and a cessation of the anticompetitive conduct which had been alleged on the part of Gulf States, transmission availability for the Cities and much stronger interconnections and possibilities of coordination for the benefit of all.

In sum, what has happened has been that the refusal of the FPC to regulate plants like those at issue in this proceeding, which utilize huge portions of the nation's water resources, and by so doing preempt other uses, has created a lacunae of regulation, the sort of "attractive gap" that this Court in ***Federal Power Commission v. Transcontinental Gas Pipeline Corp.***, 365 U.S. 1, 20-22 (1961); and ***California v. Lo-Vaca Gathering Co.***, 379 U.S. 366, 369-370 (1965) has determined Congress could not likely have intended to leave. For these reasons, it is even more essential that this Court direct the FPC to assert its appropriate licensing authority under Part I of the Act over steam plants that affect navigable waters.

III.

THE DECISION OF THE COURT BELOW RELATING TO THE COMMISSION'S AUTHORITY UNDER THE SURPLUS WATER CLAUSE SHOULD BE UPHELD.

We have shown that the court below erred in its failure to require the FPC to exercise its jurisdiction under Part I of the Act with respect to steam plants utilizing the public resource of water affecting the navigable waters of the

United States. The Commission and Arizona Public Service Co. *et. al.*, however, have asserted, in their briefs to this Court, that the court below erred in the limited relief it did grant. While this Court need not reach the issue, we now turn to the issue of limited relief, as to which the court below was correct.

The court below held that Section 4(e) of the Act "empowers the FPC to license the use of surplus water by steam plants."[35] The court arrived at the proper scope of FPC jurisdiction by analyzing the legal and historical context. It concluded that the basic principle underlying the Federal Water Power Act was as follows:

> The water resources, including the inherent water power, controlled by the Government were increasingly seen as a valuable asset to be exploited in a way that would benefit the public by insuring the self-sufficiency of projects and maximum use of public resources."[36]

The court concluded that the "surplus water" provision of Section 4(e) should be read separately from the project authorization provisions, which related to the more limited task of regulating nonfederal hydroelectric projects. Subsequent Acts relating to the Boulder Canyon Project, TVA and flood control projects reaffirmed the breadth of traditional concern. In the absence of an adequate record, the court did not rule on the application of the surplus water provision to the plants in this case, but held that the FPC had jurisdiction to license them if they fell within the surplus water category claimed by Petitioners.

Both the Commission and the Companies in their briefs contend that the court below erred in its finding that the surplus water clause granted the Commission jurisdiction to license thermal electric generating plants.[37]

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[35] *Chemehuevi Tribe of Indians* v. *Federal Power Commission*, 489 F.2d 1207 (1973), at 1235.

[36] *Id.*, at 1240.

[37] Brief for the Federal Power Commission, pp. 41-53; Brief for Arizona Public Service Company, *et. al.*, pp. 44-74.

The Commission argues that the legislative history of the Federal Power Act relates to the Act as a whole, and that the history of the Act, as interpreted by the court in making its determination that "project works" refers only to hydroelectric facilities, is similarly applicable to the surplus water clause. The Commission attempts to contradict the findings of the court that "no useful legislative history" exists which aids in the interpretation of Section 4(e) by presenting a review of the legislative history which is "fully consistent with the Act's limited purpose of developing ***hydro-electric*** power but not regulating steam power."[38]

The Companies' brief similarly takes the position that the court's findings with respect to its resolution of the "project waters" issue were dispositive of the surplus water question. The Companies, in their brief and supplement, submit an extensive and detailed narrative of the legislative history of the Act purportedly relating to the surplus water clause. Their conclusion is that "the Congressional debates, discussions, committee reports, and proposed bills mention 'surplus water' ***only*** in context of hydro-electric generation."[39]

The Cities fully support the decisionof the court below with respect to the surplus water issue that "Section 4(e) assures maximum utilization of water resources for navigation, water power, and other beneficial uses by providing for the licensing, in accordance with §10(a) . . . of non-federal construction and operation of water power projects on navigable waters, public lands or reservations, and for the licensing of the non-federal use either of water impounded by a Government dam and not required for governmental purposes."[40]

The only new issue raised by the Respondents is whether their review of the legislative history presents a persuasive reason for this Court to reject the decision by the court below. Cities find the material relating to legislative history in both the Commission and the Companies'

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[38] Brief for the Federal Power Commission, p. 42.

[39] Brief for Arizona Public Service Company ***et.al.***, p.55.

[40] 489 F.2d at 1240.

briefs and supplement copious but not determinative of the issue. Excerpts of the statements of various individual congressmen in the course of the passage of Part I of the Act indicate a wide variety of opinions as to the appropriate scope of the Act, but they do not explain why the statute contains the phrase, "surplus water or water power," instead of "surplus water" or water power" alone. When the agency must give a tortured reasoning in order to arrive at the conclusion sought by the party and that conclusion necessarily is against the public policy as stated herein, it becomes incumbent upon the court to give the words their ordinary meaning as did the court below on this issue.[41] This is a sound rule of statutory construction; it also is in accord with the public interest as represented in the Act's broad objectives.

CONCLUSION

For the foregoing reasons, this Court should reverse the holding of the court below that the Federal Power Commission does not have jurisdiction, under Part I of the Act, over steam plants which require the use of water from, and construction of structures into, streams which are, or which significantly affect, navigable waters of the United

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[41] See, *e.g.*, *NLRB* v. *Plasterers' Union*, 404 U.S. 116, (1971), where this court noted:

> "In construing a statute, the Court has ruled that legislative materials, if 'without probative value, or contradictory, or ambiguous,' should not be permitted to control the customary meaning of words." United States v. Dickerson, 310 U.S. 554, 562 (1940). See also Gemsco, Inc. v. Walling, 324 U.S. 244, 260 (1945).

States. Similarly, this Court should affirm the conclusion of the court below that the use of surplus water from Government dams makes the plants at issue in this case jurisdictional under Part I of the Act.

Respectfully submitted,

Robert C. McDiarmid
Frances E. Francis
Peter K. Matt
Daniel J. Guttman

Attorneys for
The Electric and Water Plant Board of Frankfort, Kentucky; The Municipal Light Department of Wakefield, Massachusetts; and The Northern California Power Agency.

Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

October, 1974

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

CHEMEHUEVI TRIBE OF INDIANS, ET. AL., *Petitioners*, v. FEDERAL POWER COMMISSION, *Respondent.*	No. 73-1380
ARIZONA POWER COMPANY, ET. AL., *Petitioners*, v. CHEMEHUEVI TRIBE OF INDIANS, ET. AL., *Respondent.*	No. 73-1666

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF BUFFALO RAPIDS IRRIGATION PROJECT; CUSTER ROD & GUN CLUB; TONGUE-YELLOWSTONE BEET GROWERS; and TROUT, UNLIMITED, as *AMICUS CURIAE*

Submitted by, JAMES H. GOETZ, 15 S. Tracy, Suite 8, Bozeman, MT., Attorney for *amicus curiae.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

CHEMEHUEVI TRIBE OF INDIANS, ET. AL., *Petitioners*, v. FEDERAL POWER COMMISSION, *Respondent.*	)	No. 73-1380
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By consent of Petitioners, Respondents and Intervening Petitioners-Respondents endorsed hereon, TROUT, UNLIMITED, et. al., files this brief as *amicus curiae.*

Interest of the Amicus Curiae

The *amicus curiae*, Buffalo Rapids Irrigation Project, Custer Rod and Gun Club, Tongue-Yellowstone Beet Growers, and Trout, Unlimited, have an interest in this case in that they have pending before the Federal Power Commission a Complaint and Petition to Show Cause[1] (filed in July, 1973)[2] which poses the same questions as those presented for decision in the instant cases, namely, whether the massive coal-fired electrical generating plants presently proposed to be constructed at Colstrip, Montana, by Montana Power Company and four Pacific-Northwest utilities[3], are subject to Federal Power Commission licensing jurisdiction under both Section 4(e) of the Federal Power Act, 16 U.S.C. §797(e), and the "project works" provision of the same act, 16 U.S.C. §797(e), because these plants will divert for *totally consumptive* use massive amounts of water from the Yellowstone River, a navigable river.

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[1] Section 18 C.F.R. §§1.6(a), (d), (1972).

[2] F.P.C., Docket No. E-8335.

[3] The other utilities are: Puget Sound Power & Light Co., Portland General Electric Co.; Washington Water Power Co.; and, Pacific Power and Light Co.

ARGUMENT

A. THE NORTHERN GREAT PLAINS

This brief does not attempt to treat the complex legal issues in these cases in an exhaustive manner. That has been done competently by the parties. The purpose of this brief is to place before this Court a different factual perspective — stemming from coal-fired electrical power development on the Northern Great Plains — so that this Court will be able to reach the very important legal issues presented in these cases with a more comprehensive understanding of the factual ramifications.

Montana and Wyoming contain under present calculations forty-six per cent (46%) of the nation's strippable reserves of bituminous coal and lignite. Strippable coal is found in this area (called the "Fort Union Formation") in seams of five (5) to two hundred fifty (250) feet in thickness with ten (10) to two hundred (200) feet of overburden[4]. Western coal, particularly that of the Fort Union Formation, because of its low sulfur content, is in high demand to satisfy this nation's seemingly insatiable energy needs.[5]

In 1970 and 1971, the United States Bureau of Reclamation, in conjunction with a number of utilities prepared the "North Central Power Study" which covered the states of Idaho, Montana, Wyoming, Colorado, North

[4] See: Melcher, Albert G., et. al., *Wanted-A Better Approach to Energy Planning*, ROMCOE, Denver, Colo. See also, "North Central Power Study," Report of Phase I, Vol. II, Bureau of Reclamation.

[5] See: *Second Annual Report*, Montana Environmental Quality Council, October, 1973.

Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa and Missouri. One summary which demonstrates the magnitude of the potential coal development in that area states as follows:

> "Proven strippable coal resources in the region are capable of sustaining well over 200,000 mw in thermal power plants of 1,000 mw or more, with 35-year economic lives. This is only a small part of the coal resource potential in the NCPS area. Forty-two potential sites have been identified. Ten of these, each for a 10,000 mw plant, are located in one area of about 30 by 70 miles centered on Gillette, Wyoming . . .
> (Footnote 4: . . . A 10,000 mw plant will be about 14 times as large as the renowned 'Four Corners' plant at Farmington, New Mexico, was when it first created the concern about air quality from the Southwest power plants. The Four Corners plant is being expanded to about 2,100 mw, still about one-fifth the size of some contemplated for the NCPS area . . .)"[6]

The development of electrical power from coal in the Northern Great Plains area is largely dependent on the supply of water. The 1973 report of the Montana Coal Task Force states:

> "Water controls all activity in this semiarid region, and the industrial future of the Fort Union coal fields is no exception because coal-based development requires enormous quantities of water for cooling and conversion. Because

[6] Id., Melcher, p. 10.

> most of the coal fields are far removed from existing surface water sources, the nature and extent of development would depend on the quantity of water made available at the mine site. A large volume of easily accessible water would allow extensive generating and conversion complexes. If this supply is not provided through several new storage facilities and an intricate system of government pipelines, development would be more restricted and probably concentrated on mining and export of coal."[7]

The major potential source of water for Fort Union coal development is the Yellowstone River system. The Yellowstone River begins high in the mountains of Yellowstone National Park and winds its way in a northeasterly direction through eastern Montana, and flows into the Missouri River near the Montana-North Dakota border. Although several tributaries of the Yellowstone have dams, the main stem of the Yellowstone is essentially unencumbered by man-made developments. At all points in the area of the coal development in question, the Yellowstone River is navigable.[8] The effect that coal development will have on the Yellowstone River has been stated as follows:

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[7] *Coal Development in Eastern Montana, A Situation Report of the Montana Coal Task Force*, January, 1973, p. 9.

[8] *Crow Tribe v. USA*, Civil No. 214, U. S. Dist. Ct. D. Mont., Judge Jameson, October 1, 1963; (this decision found the Big Horn river navigable to its confluence with the Little Big Horn and therefore subject to Federal jurisdiction. The Big Horn is a tributary of the Yellowstone. *A fortiori*, the Yellowstone is navigable at least to its confluence with the Big Horn, a point upstream from the Colstrip diversions.

> "One of the most significant coal-development issues is the prospect of massive consumption of water from the Yellowstone River and tributaries. The U. S. Bureau of Reclamation projects a possible annual water requirement of 2.6 million acre feet. This volume represents 29.7 percent of the river's average annual discharge (8.8 million acre feet per year), and in a dry year, such as those experienced in the early sixties, the river's annual discharge might be only half that figure. The same projected level of consumption would leave 1.8 million acre feet of water in the river in such a year, or 20.5 percent of the average flow. Once such industrial water consumption commences, it may be expected to continue regardless of the flow conditions, in the Yellowstone River System. The market place will continue to demand power."[9]

Thus, the problem of coal development and conversion ino electrical energy and the accompanying demand for massive amounts of water has become a focal one. Tie recently-published study sponsored by the Ford Foundation and the National Academy of Sciences, *Rehabilit-*

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[9] *Supra.*, Note No. 7, p. 39. See also: Anderson, Bob, "Water and Eastern Montana Coal Development," *Second Annual Report*, Montana Environmental Quality Council, October, 1973. "What effect will massive diversions have on thee flow regions? If all of the options and applications for water are realized, about 2.7 mafy (3,730 cfs) will be diverted; presumably most or all of this water would be consumed. A glance at Figures 1 & 2 clearly shows that the Yellowstoie often does not even have that much water . . .

tion Potential of Western Coal Lands, is quite blunt about the problem:

> "The shortage of water is a major factor in planning for future development of coal reserves in the American West. Although we conclude that enough water is available for mining and rehabilitation at most sites, *not enough water exists for large scale conversion of coal to other energy forms* (e.g. gasification or steam electric power). The potential environmental and social impacts of the use of this water for large scale energy conversion projects would exceed by far the anticipated impact of mining alone. We recommend that alternate locations be considered for energy conversion facilities, and that adequate evaluations be made of the options (including rehabilitation) for the various local uses of the available water."[10] (emphasis added)

Earlier this year, the rate of water diversions in Montana became so alarming that Governor Judge proposed a 3-year moratorium on water diversions from the Yellowstone River (S.B. 728; the bill was passed). In introducing the moratorium proposal, the Governor stated:

> "With a near annual flow of about 9 million acre feet of water at our border, options, applications and requests have been made for approximately

[10] ***Rehabilitation Potential of Western Coal Lands*, A report of the Energy Policy Project of the Ford Foundation, National Academy of Sciences, Ballinger Publishing Co., 1974, p. 6.**

> 3,300,000 acre feet from waters in the Yellowstone Basin. In 1972, the Bureau of Reclamation projected that 2.6 million acre feet would be needed annually for coal development by the year 2002. In less than two years, that figure has already been far exceeded, and all indications are that this amount will grow significantly within the immediate future."[11]

B. THE COLSTRIP PLANTS

The specific interest of the *amicus curiae* is focused on the Yellowstone River in Montana, and the massive electrical generating plants which are being constructed (or contemplated) at Colstrip, Montana. The Montana Power Company, together with the Puget Sound Power and Light Co., are currently constructing two plants at Colstrip, Montana, with a proposed total capacity of 350 mw each. These two companies, together with three other utilities have proposed two more plants at Colstrip, each with a capacity of 700 mw.

These four plants will be coal-fired steam-generating plants with wet cooling (i.e. water-consumptive) processes. They will demand substantial amounts of water with no return flow to the river, as occurs with agricultural usage. For the Colstrip Units alone, the water demand will necessitate the construction of a 60-inch pipeline from the Yellowstone River near Nichols to the generating complex at Colstrip, a distance of about 30 miles.[12] Water consumption for Units 3 and 4 will average about 16,000 acre feet

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[11] Senate Journal of the Forty-third Legislature of the State of Montana, Vol. 1, p. 172.

[12] See: Note 7, *Supra*, p. 13.

a year with a maximum of up to 26,000 acre feet. Settling ponds covering 60 surface acres will be necessary.[13] These withdrawals will affect navigability since pumping structures will be located in the Yellowstone River. The complaint filed by the parties *amicus curiae* with the Federal Power Commission (Docket No. E-8335) has not been acted upon by the FPC for over one year. The parties *amicus curiae* are irrigation farmers (primarily growing sugar beets) downstream from the Colstrip diversion who are dependent upon a regular and adequate flow of the Yellowstone River, particularly in the late summer and early fall, and recreational users who make substantial use of the Yellowstone River for fishing, hunting and aesthetic purposes. The Montana Power Company appropriation will make use of surplus water from a government dam—namely, the Yellowtail Dam on the Big Horn River, a major tributary to the Yellowstone.

The water appropriation made on the Yellowstone River by the Montana Power Company (dated December 16, 1970) claims an appropriation of 250 cubic feet per second (112,200 gallons per minute) on all days and at all seasons of the year.[14] This appropriation was made pur-

[13] Gill, Thomas J., "Montana Coal-Development in Process 1973," *Second Annual Report*, Montana Environmental Quality Council, October, 1973. Non-water effects relating to the construction of proposed Units 3 and 4 include the consumption of about 6 million tons of coal per year and the construction of a 500 kilovolt transmission line between Colstrip and Hot Springs, Montana, a distance of about 400 miles.

[14] Montana Water Resources Board, 1970, Montana Power's Notice of Appropriation.

Note: This appropriation equals approximately 181,000 acre feet per year. Approximately 20,000 acre feet per year is consumed annually by a 1,000 mw electrical

suant to the traditional Montana Water Law based on the prior appropriation theory — *i.e.* anyone has the right to appropriate unappropriated water as long as such water is put to beneficial use, Section 89-801; 89-802, Revised Codes of Montana (1947).[15] The Montana Power appropriation indicates the ease with which a person or a corporation can take the public's water. A part of the Yellowstone River is being studied by the Bureau of Outdoor Recreation for designation under the Wild and Scenic Rivers Act, P.L. 90-542,[16] yet, a corporation with a stroke of the pen can irreversibly dewater the stream. This total lack of Federal control over a river of national importance,[17] which is navigable and therefore subject to Federal jurisdiction, is one of the unfortunate and anomalous consequences of the failure of the Federal Power Commission to assert jurisdiction. Given the magnitude of the potential generating capacity of the strippable coal reserves of the Northern Great Plains, the first four Colstrip plants represent only

generating plant operating at full load and using an evaporative tower for cooling (*Rehabilitation Potential of Western Coal Lands, Supra*, p. 101). By these calculations, the appropriation by Montana Power could suffice for nine 1,000 mw plants.

[15] These sections have been repealed and the general Montana Water Law has been modified. See Section 89-866, *et. seq.*; nevertheless the appropriation by Montana Power Co. may well be at least partially valid by operation of the grandfather clause, §89-872, Revised Codes of Montana (1947). In any case, prior appropriation and beneficial use remain the operative factors governing Montana Water Law.

[16] See, Draft, "The Wild, Scenic and Recreational Potentials of the Yellowstone River, from Gardiner to Pompey's Pillar in Montana," prepared by Bureau of Outdoor Recreation, Mid-continent Region, Denver, Colorado, May, 1974.

[17] Ibid.

the beginning of a massive draining of the water resources of the region. That this can occur without the regulatory supervision of the Federal Power Commission, or any other Federal agency, does violence to the goal of comprehensive water resource planning that stimulated passage of the original Federal Water Power Act of 1920.

C. COMPREHENSIVE REGULATION OF WATER RESOURCE DEVELOPMENT

While there is undeniably substantial legislative history which seems to focus on the *hydroelectric* basis for the development of the Federal Water Power Act of 1920, the central purpose of the act was to provide for a *comprehensive* scheme of water development vis-a-vis power production. The Supreme Court discussed the history and purpose of the Federal Water Power Act in 1946 in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152. The Court described the general purposes of the Act as follows:

> "It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a *complete scheme of national regulation* which would promote the *comprehensive* development of the water resources of the Nation, in *so far as it was within the reach of the federal power to do so*, instead of the piecemeal, restrictive, negative approach of the Rivers and Harbors Acts and other federal laws previously enacted.
>
> It was a major undertaking involving a major change of national policy. That it was the intention of Congress to secure a *comprehensive* development of national resources and not merely

> to prevent obstructions to navigation is apparent from the provisions of the act . . ." (emphasis added) (at 172 note 17).

The legislative history of the Federal Water Power Act reveals that a variety of concerns motivated the passage of the Act.[18] Among the concerns were: protection of navigability, removal of a disincentive for private hydroelectric development so that increased private power development would take place (by eliminating the uncertainty as to what the government would do once private dams were built)[19]; conservation of water resources through comprehensive planning[20]; and protection of the public's interest in its water from laissez-faire exploitation by the corporations.

In 1919, Senator Jones of Washington, said in respect to the 1919 version of the Federal Water Power Act:

> "The development of our water powers is intimately connected with the solution of such great national problems as the national defense; extension of internal waterways; shortage of food; conservation of coal, oil, and labor; irrigation of arid lands; and railroad car shortage."[21]

There was much debate over whether the powers of the Commission under the 1917 Act (Rivers and Harbors Act

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[18] This *amicus* brief does not purport to treat this legislative history exhaustively since this has been done by the parties.

[19] See Kerwin, J., *Federal Water Power Legislation* (1926), at 202-207; see also 1919 Cong. Rec. 244, Senate Debates.

[20] 66th Congress, 1st Session; House Committee on Water Power, Report No. 61, p. 3, p. 6.

[21] 1919 Cong. Rec. 241.

of 1917, 40 Stat. 269) should be retained by the Commission under the 1920 Act. Although the 1917 Act was expressly repealed, those favoring an expansive view of the powers of the Commission were assured that the essence of the Newlands Bill (the 1917 Act) was retained. After quoting from the 1920 bill (Secs. 4a and 4b), Senator Jones said:

> " . . . the splendid ideas of this great man have been very largely incorporated in the measures to which I have referred, and, while the pending bill proposes to repeal the clause which provided for that commission, we are continuing in a legislative way the great ideas of Senator Newlands to a very great extent."[22]

Newlands had argued for a very comprehensive water resources management system and the 1917 Act was passed to implement that system although a commission had not yet been appointed by the President under that Act.[23]

While it is clear that much of the Congressional debate *focused* on hydroelectric power, it is by no means clear that the framers purposely omitted steam power from Federal regulation as the Circuit Court suggests at p. 1231 of its opinion. This Court should, if possible, read the statutes in a manner which would result in a rational system of regulation by the Federal Power Commission. The attempt by the Circuit Court to make a distinction

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[22] 1920 Cong. Rec. 7772.

[23] See 1920 Cong. Rec. 7725, Senator Hale: "The present water-power act provides a method for getting permission of the Federal authorities to erect dams *and other obstructions* on the navigable waters of the country." (emphasis added)

(at p. 1232) between the use of fossil fuel to "elevate water for storage purposes" and the use of fossil fuel to heat water "to drive a turbine" is neither meaningful nor compelled by the legislative history.

The legislative history indicates that Congress was attempting to promote energy production through a rational and comprehensive scheme of water development. This Court should honor that attempt rather than sanction disingenuous distinctions. Since the *Taum Sauk* case, *FPC v. Union Electric Co.*, 381 U.S. 90 (1965) did not squarely face this issue and since the implementation of the *obiter dictum* in that case would produce anomalous consequences, that dictum should not control here.

Intervenors argue that:

> "The quantities of water diverted and used by a steam plant in boilers and cooling apparatus are miniscule compared to the quantities required by a hydroelectric project generating the same quantity of power, and Congress, concerned with the development of water power, had no reason to concern itself with the insignificant quantities of water used by thermal plants." (Intervenors' brief, pp. 46, 47)

The obvious point neglected by the Intervenors is the *totally consumptive* nature of the use of water by the steam plants. At the Colstrip plants, for instance, there are no plans for returning any of the water to the Yellowstone River. The National Academy of Sciences study indicates:

> "Approximately 20,000 acre feet of water per year . . . is consumed annually by a 1,000 megawatt electrical generating plant operating at full

> load and using an evaporative tower for cooling . . .
>
> These figures represent the order of magnitude of the consumptive use of water for energy conversion and it is important to note that even with the use of water-efficient dry cooling towers, coal conversion processes will consume several million gallons per day of water . . . Even these quantities of water are not normally available at coal mine sites in the western United States. In most coal rich areas the local supply of ground or surface water is insufficient to meet the consumptive use requirements in conventional energy conversion processes."[24]

The *consumptive* nature of the steam generators is the factor which renders them, in many ways, more damaging to this country's navigable waterways than any hydro-electric plant. These truly-national waterways, which are being dewatered at the *laissez-faire* whim of the corporations, cry out for some scheme of comprehensive Federal regulation.

In addition to the above, the legislative history of the Federal Water Power Act reveals a distinct populistic attitude on the part of many of the supporters of the bill.

In 1908 and 1909, President Theodore Roosevelt vetoed several specific dam authorizations passed by the Congress under the General Dam Act of 1906. Among the conditions which Roosevelt indicated in his veto message of April 3, 1908, as necessary for his acquiescence were:

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[24] *Supra*, Note 10, p. 101.

> "Third. There shall be a license fee or charge which, although small and nominal at the outset, could be adjusted in the public interest.
> Fourth. There should be provision for the termination of the grant at a definite time, leaving the future to determine its course . . ."[25]

The 1920 bill incorporated these provisions. Furthermore the House Committee on Water Power stated:

> "Section 7 provides that in issuing preliminary permits or licenses the commission may, in its discretion, give preference to applications by states and municipalities provided the plans of same are deemed by the commission *best adapted to conserve and utilize* in the public interest and navigation and *water resources* of the region, and may likewise give preference to the applicant the plans of which it finds best adapted to develop, conserve, and utilize the navigation and water resources of the region."[26] (emphasis added)

Obviously, if the Federal Power Commission is going to limit artificially its jurisdiction to hydroelectric development, this mandate will be impossible to fulfill. The close scrutiny by the Federal Power Commission of a hydroelectric proposal on the Yellowstone River may be meaningless or even counterproductive if a private utility can, without any Federal guidance or control whatever, pirate massive amounts of water from public streams for fossil-fueled electrical production. At least in the *Chemehuevi* situation,

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[25] See: 66th Congress, 1st Session House Committee on Water Power Report No. 61, pp. 2, 3.

[26] Id at 6.

the United States Department of Interior had undertaken some review of the plants in question (albeit, inadequate). At Colstrip, Montana, there has been *no* Federal environmental impact statement prepared on the plants, and little, if any, indirect Federal review.

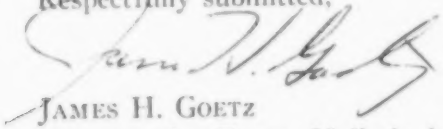
Finally, the giant coal-powered, steam generating plants contemplated for the Northern Great Plains, and now in their infancy at Colstrip, will result in hundreds of miles of transmission lines constructed across the rangeland, carrying locally produced electrical energy to distant, high-consumption regions of the nation. The prospect presents the irony of having enormous acreage of rangeland permanently destroyed or disfigured and the most precious resource of this semi-arid region drained from its rivers, while the beneficiaries of this destruction reside in population centers over a thousand miles away.

Although this Court has stated emphatically that, "there is no question that the interstate transmission of electric energy is fully subject to the commerce powers of Congress," *Union Electric, Supra*, at 94, there arises the strong possibility that no Federal regulatory power will be exercised over the construction of steam generators and attendant transmission facilities in the Northern Great Plains. Unless, in the instant case, the Federal Power Commission jurisdiction is found to embrace coal-fired plants as well as hydroelectric generators, precedent will then lie for the uncontrolled exhaustion of the region's water resources, despite the historic mandate for a comprehensive development policy based on conservation of the limited navigation and water resources of the nation. To base that precedent on the facile distinction between hydroelectric and water-consumptive steam generators will, ironically, gut the fundamental purpose of the 1920 Act.

Conclusion

For the foregoing reasons, and for the reasons set forth by the Chemehuevi Tribe, et al., Trout, Unlimited, et. al., as *amicus curiae* respectfully submit that this Court should reverse the Circuit Court's ruling that fossil-fueled electrical generating plants are not "project works" under the Federal Power Act, and should affirm the Circuit Court's ruling that fossil-fueled electrical generating plants which use surplus water from a government dam are subject to Federal Power Commission licensing jurisdiction under the Federal Power Act.

Respectfully submitted,



James H. Goetz
Attorney for Trout, Unlimited, et. al., as *amicus curiae.*
15 South Tracy, Suite 8
Bozeman, Montana 59715

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail on the following persons on this ..... day of October, 1974:

Joseph Brecher, Esq.
Native American Rights Fund
1506 Broadway
Boulder, Colorado
Attorney for Chemehuevi Tribe of Indians
(Respondent in No. 73-1666, Petitioner in No. 73-1380)

Northcutt Ely, Esq.
Frederick H. Ritts, Esq.
Law Offices of Northcutt Ely
Watergate 600 Building
Washington, D. C. 20037
Attorneys for Arizona Public Service Company
(Petitioners in No. 73-1666, Respondents in No. 73-1380, [Intervenors Below])

Robert H. Bork, Esq.
Solicitor General's Office
Department of Justice
Washington, D. C. 20530
Attorney for Federal Power Commission
(Petitioner in No. 73-1666, Respondent in No. 73-1380)

s/JAMES H. GOETZ
JAMES H. GOETZ
15 South Tracy, Suite 8
Bozeman, Montana 59715
Attorney for TROUT, UNLIMITED, et. al., as *amicus curiae*.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

CHEMEHUEVI TRIBE OF INDIANS, ET. AL., *Petitioners*, v. FEDERAL POWER COMMISSION, *Respondent.*	)	No. 73-1380
ARIZONA POWER COMPANY, ET. AL., *Petitioners*, v. CHEMEHUEVI TRIBE OF INDIANS, ET. AL., *Respondent.*	)	No. 73-1666

TO: Joseph Brecher, Esq.
Native Amreican Rights Fund
1506 Broadway
Boulder, Colorado
Attorney for Chemehuevi Tribe of Indians
(Respondent in No. 73-1666, Petitioner in No. 73-1380)

Northcutt Ely
Frederick H. Ritts
Law Offices of Northcutt Ely
Watergate 600 Building
Washington, D.C. 20037
Attorneys for Arizona Public Service Company
(Petitioners in No. 73-1666, Respendents in No. 73-1380, [Intervenors Below])

Robert H. Bork
Solicitor General's Office
Department of Justice
Attorney for Federal Power Commission
(Petitioner in No. 73-1666, Respondent in No. 73-1380)

BUFFALO RAPIDS IRRIGATION PROJECT, c/o Ed Norlin, Project Manager, Terry, Montana, CUSTER ROD & GUN CLUB, c/o Bryan Schoof, President, Miles City, Montana, TONGUE-YELLOWSTONE BEET GROWERS, c/o Willie Day, C B Route, Glendive, Montana, and TROUT, UNLIMITED, c/o Lawrence Reno, Reno & Judd, 646 Metropolitan Building, Denver, Colorado, state that they are Complainants in Docket No. E 8335 before the Federal Power Commission, that they have asserted in their complaint that the Federal Power Commission has licensing jurisdiction under Part 1 of the Federal Power Act, 16 U.S.C. §§ 791a-823 to license as "project works," steam electric power plants that obtain cooling waters from navigable rivers of the United States (namely, the Yellowstone River in Montana); and that the Federal Power Commission has jurisdiction to license use by thermal-electric generating plants of "surplus

water" from any government dam; that they have a vital interest, therefore, in supporting the position of the Chemehuevi Tribe in the above-entitled action, and, therefore, request the consent of the parties to the filing by Buffalo Rapids Irrigation District et. al. of a brief *amicus curiae* in support of the position of the Chemehuevi Tribe of Indians.

Dated July 10, 1974.

s/JAMES H. GOETZ

JAMES H. GOETZ
15 South Tracy, Suite 8
Bozeman, Montana 59715
Attorney for Buffalo Rapids Irrigation District, et. al.

CONSENT TO FILING OF AMICUS CURIAE BRIEF

We hereby consent, pursuant to Rule 42 of the Supreme Court Rules, that the above *amicus curiae* brief may be filed in this proceeding with the Supreme Court of the United States.

s/JOSEPH J. BRECHER

JOSEPH BRECHER

s/NORTHCUTT ELY
NORTHCUTT ELY

s/ROBERT H. BORK

ROBERT H. BORK

FILED
JAN 6 1975
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Nos. 73-1380, 73-1666, 73-1667

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v.

FEDERAL POWER COMMISSION, *Respondent.*

ARIZONA PUBLIC SERVICE COMPANY ET AL., *Petitioners,*

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THE CHEMEHUEVI TRIBE OF INDIANS ET AL., *Respondents.*

FEDERAL POWER COMMISSION, *Petitioner,*

v.

THE CHEMEHUEVI TRIBE OF INDIANS ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE MONTANA POWER COMPANY, PACIFIC POWER & LIGHT COMPANY, PORTLAND GENERAL ELECTRIC COMPANY, PUGET SOUND POWER & LIGHT COMPANY, AND THE WASHINGTON WATER POWER COMPANY, AS AMICI CURIAE

(The names and addresses of Counsel appear on the inside cover.)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

FRANCIS M. SHEA
RICHARD T. CONWAY
DAVID BOOTH BEERS
SHEA AND GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

WILLIAM H. COLDIRON
MELVYN RYAN
40 East Broadway
Butte, Montana 59701

WARREN HASTINGS
621 S. W. Alder Street
Portland, Oregon 97205

DOUGLAS P. BIEGHLE
WILLIAM S. WEAVER
PERKINS, COLE, STONE, OLSEN
& WILLIAMS
1900 Washington Building
Seattle, Washington 98101

ALLAN P. O'KELLY
PAINE, LOWE, COFFIN,
HERMAN & O'KELLY
1400 Washington Trust Bank
Building
Spokane, Washington 99204

RICHARD D. BACH
RIVES, BONYHADI
& DRUMMOND
1400 Public Service Building
920 Southwest Sixth Avenue
Portland, Oregon 97204

Attorneys for the Amici Curiae

Of Counsel:

SHEA AND GARDNER
734 Fifteenth Street, N.W.
Washington, D. C. 20005

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BRIEF FOR THE MONTANA POWER COMPANY, PACIFIC POWER & LIGHT COMPANY, PORTLAND GENERAL ELECTRIC COMPANY, PUGET SOUND POWER & LIGHT COMPANY, AND THE WASHINGTON WATER POWER COMPANY, AS AMICI CURIAE

The Montana Power Company, Pacific Power & Light Company, Portland General Electric Company, Puget Sound Power & Light Company, and The Wash-

ington Water Power Company file this brief as amici curiae, pursuant to Rule 42 of the Court and with the consents of all the parties.

INTEREST OF THE AMICI CURIAE

The five amici are investor-owned electric utilities and are together the principal suppliers of electric energy for commercial, industrial, and residential purposes throughout the Northwest, serving parts of Montana, Wyoming, Idaho, Washington, California, Nevada, and Oregon. To meet the growing need for electrical energy in the Northwest, these utilities have jointly commenced construction of a coal-fired steam electric generating project at Colstrip, Montana, in the eastern part of the state and about thirty-five miles south of the Yellowstone River at Forsythe, Montana. The Colstrip project, which will ultimately have four generating units with a total capacity of 2100 mw, will use cooling water from the Yellowstone diverted pursuant to an appropriative right under Montana law. The first two units of the Colstrip project are now being constructed jointly by two of the amici and are scheduled to begin operation in 1975. The remaining two units will be built by all the amici and are scheduled to commence operation in 1978 and 1979. Fuel for the project will be supplied by a nearby coal mine operated by a subsidiary of one of the amici.

The interest of the amici in the instant proceedings is twofold. First, the Buffalo Rapids Irrigation Project, Custer Rod & Gun Club, Tongue-Yellowstone Beet Growers, and Trout Unlimited (hereinafter together "Buffalo Rapids") have jointly filed a complaint with the Federal Power Commission to require the amici to obtain a license from the Commission for

the Colstrip project under Section 4(e) of the Federal Power Act, 41 Stat. 1065 (1920), *as amended*, 16 U.S.C. § 797(e). That proceeding thus raises in the Commission the issues now pending before this Court respecting the construction of Section 4(e) of the Act. Second, Buffalo Rapids has filed an amicus brief in this Court in which it argues that the projected use of Yellowstone water for the Colstrip and other projects demonstrates the need for reading the Act broadly enough to embrace steam plants within the Commission's licensing jurisdiction.

The arguments based upon the relevant statutory language, legislative history, and the precedents in support of the position of the Solicitor General and of the Arizona Public Service Company et al. have been adequately presented in the briefs of those parties. We shall therefore simply note our agreement in general with those arguments and with the position that Congress in enacting Section 4(e) of the Act did not intend that the Commission embrace steam electric generating plants within its licensing jurisdiction. We shall, however, respond to the *ad hominem* arguments made by Buffalo Rapids, because those arguments erroneously are based on unsupportable factual assertions about the Colstrip project of these amici.

ARGUMENT

The central contention of Buffalo Rapids throughout its brief is that although the legislative history of the Act "seems to focus on the *hydroelectric* basis for the development of the" Act, the Court should give a broad reading to the Act "to provide for a *comprehensive* scheme of water development vis-a-vis power production" (Br. at 10; emphasis in original). With-

out this broad reading, argues Buffalo Rapids, there will be no adequate federal regulation of steam power plants using water from rivers such as the Yellowstone; and corporations like the amici, by exercising state appropriative rights, will "pirate" these waters and "dewater" rivers like the Yellowstone "with the stroke of the pen" (*e.g.* Br. at 9, 14-16). The example Buffalo Rapids offers the Court in support of the foregoing position is the use of Yellowstone water by the amici for the Colstrip project, allegedly by way of "a different factual perspective" from the use of Colorado River water by the "Four Corners plants" (Br. at 2-3).

We show in this brief that Buffalo Rapids' "factual" charges are untrue and sharply disputed. The Court has no record before it respecting the Yellowstone which would lend any support for a reading of the Act so broad as to embrace the licensing of steam plants. The analogy to the Colstrip project is not apt, both because of the very small amounts of water involved as compared with the flow of the river and with uses other than for power generation, and because of the extensive federal and state regulation and environmental review to which the Colstrip project is subject apart from FPC licensing.

1. We agree with Buffalo Rapids as to the need for "factual perspective", especially respecting the charges made about the Colstrip project and the alleged "dewatering" of the Yellowstone River by the amici. The facts are that the average annual flow of the Yellowstone into the Missouri River, just east of the Montana border in North Dakota, is about 9 million

acre feet.[1] This is net of all depletions—municipal, agricultural, and industrial. At normal operation, which will not be reached at least until some time in 1979, the Colstrip project will divert from the Yellowstone for consumptive use about 30,000 acre feet per year, or only about one-third of one percent of the river's present average annual flow.[2] That miniscule diversion for Colstrip should be contrasted with the average annual diversion for agricultural purposes by Buffalo Rapids. During the period from 1966 to 1971 Buffalo Rapids and three other reclamation projects diverted annually an average of 424,000 acre feet —

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[1] Calculations of the amount flowing into the Missouri differ. One measures the average annual flow from 1911-1970 at Sidney, Montana, a few miles downstream from the North Dakota border, at 12,980 cfs, or about 9.4 million acre feet. Ecological Consulting Service, *Report to the Montana Power Company: A Study of the Effects of Water Withdrawal From the Yellowstone River*, Table IX at 39 (1974) ("Data taken from Water Resources for Montana, Part I. USDI, USGS. 1961-1971"). The Bureau of Reclamation's *Appraisal Report on Montana-Wyoming Aqueducts* (1972), p. 3, estimates that the "[a]verage annual discharge into the Missouri River is about 8.8 million acre-feet". For these purposes we accept the estimate of Montana Governor Judge in a statement relied upon by Buffalo Rapids (Br. at 6) as to "a near annual flow of about 9 million acre feet of water at our border."

[2] The annual consumptive use for Colstrip of about 30,000—out of 9 million—acre feet assumes normal operations at 80% of capacity. The diversion will be pursuant to an appropriative right claimed and to be perfected under Montana law, and no water will be purchased from the United States. Given the small amount of water to be diverted and the fact that state regulatory authorities will require the project to be equipped with a storage pond capable of supplying the plant's requirements for nearly two months, the Colstrip diversion will not be dependent upon the regulation of the stream flow by a government dam. Thus, there is no support for the allegation by Buffalo Rapids (Br. at 8) that the amici will use "surplus water" from a government dam within the meaning of Section 4(e) of the Act.

nearly fifteen times that calculated for Colstrip.[3] The average annual diversion during that period by the Buffalo Rapids irrigation project alone was 84,561 acre feet.[4] Under the doctrine of prior appropriation applicable in Montana, these agricultural uses are fully protected against the Colstrip or any other subsequent use.

These circumstances illustrate, first, the fact that the Colstrip diversion will not have any significant impact on the flow of the Yellowstone — and no impact at all on existing uses. These circumstances also demonstrate that FPC licensing jurisdiction over steam plants will not itself give the federal government comprehensive authority to regulate the use of water from the Yellowstone or any other river. Moreover, in addition to the demands for water for reclamation-agricultural projects, there are significant additional demands for industrial, municipal, recreational, and agricultural uses which would not be covered by FPC licensing jurisdiction over steam plants.

Beyond the Colstrip project, there is no evidence before the Court or otherwise available of which we are aware giving any meaningful estimate of the future demands on the Yellowstone of the magnitude complained of by Buffalo Rapids. The Colstrip project is the only steam generating plant currently under construction which will use water from the Yellowstone River system. In making its sensational allegations concerning potential uses, Buffalo Rapids relies

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[3] Ecological Consulting Service, *supra* n. 1, Table VII at 35 ("Data taken from Crop Production Summary, Federal Reclamation Projects—Region 6. USDI, Bureau of Reclamation, 1966-72").

[4] See n. 3 above.

(Br. at 2-3) on figures for "potential" electric power development in a multi-state area from the "North Central Power Study," a joint federal-industry study which was not continued after its first exploratory phase. It is clear even from its description by Buffalo Rapids, however, that that Study did not attempt to estimate what development would ultimately take place. Rather, the primary focus of the Study was simply to identify locations within a five-state area where sufficient strippable coal reserves and water supply could be made available to support generating plants of 1000 mw or more.[5]

The other sources relied upon by Buffalo Rapids (Br. at 3-5) are equally hypothetical. They clearly rely either upon the North Central Power Study (see Br. at 3) or upon the Bureau of Reclamation's *Appraisal Report on Montana-Wyoming Aqueducts* (1972) (see Br. at 5). That report, also the first phase of a study project whose funding was not continued, only "identifie[d] water resources . . . that may be available for development" of coal resources in the Northern Great Plains states "to convey water from sources to points of possible use" (*Report*, Cover Letter of the Project Director, April 1972). The report assumed, without investigation of its own, a maximum ultimate demand of 2.6 million acre feet per year — an assumption based upon certain contracts giving options to purchase water in the future from the Bureau of Reclamation, "indicated interest" in additional water by "[e]nergy companies", and the "recently completed power study" discussed above (*Report* at 11). The report concluded, nevertheless,

[5] See, *e.g.*, North Central Power Study, *Report of Phase I* at 11 (October 1971).

that even "in the driest year," and "after meeting all existing water uses and after having supplied potential industrial water needs," "there will be ample water to meet future municipal and agricultural needs" (*Report* at 31).[6]

Buffalo Rapids points to a number of "options" and "applications" for the purchase of Yellowstone water from Bureau of Reclamation dams for industrial uses referred to in the foregoing *Appraisal Report* (Br. at 5, 6). But in making its charges that the river will be "dewatered" as a result, Buffalo Rapids assumes that all such options and applications will be exercised or granted to the maximum extent. In 1967 the Department of Interior began entering into option contracts for the sale of water stored behind Bureau of Reclamation dams in the Yellowstone and Missouri River systems, and several applications for additional option contracts have been filed but not granted. However, in papers filed by the Department of Interior within the last few weeks in litigation in the District of Columbia, it was revealed that no such option contracts have been entered into since 1971; that "[n]o water has been released pursuant to [these] options or contracts" dating back to 1967; and that "no applications for release of water pursuant to options or contracts" are now pending.[7] Moreover, it cannot

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[6] The report noted that an "environmental impact statement as required by the National Environmental Policy Act of 1969 will be prepared prior to initiating feasibility investigations" *Report* at 30).

[7] Affidavit of William W. Lyons, Deputy Under Secretary of the Department of Interior at 5; Answers of Defendant Rogers C. B. Morton, Secretary of Interior, to Plaintiffs' Revised Supplemental Interrogatories to Federal Defendants, Nos. 27, 28 (November 1974), *Sierra Club Et Al.* v. *Rogers C. B. Morton Et Al.*, Civil Action No. 1182-73 (D. D.C.), *appeal pending*, No. 74-1389 (D.C Cir.).

be determined from an application or claim (by contract or appropriation) for an amount of water how much water will ultimately be put to beneficial consumptive use. For example, the initial appropriation claim filed under Montana law for the Colstrip project was for 181,000 acre feet of water per year, but the total annual consumptive use now projected for the entire Colstrip project will only be about 30,000 acre feet. It cannot be assumed that other so-called estimates of future water claims upon the Yellowstone of the kind relied upon by Buffalo Rapids will not prove similarly greater than original "safe" estimates.[8]

In short, the facts regarding the Colstrip project do not support Buffalo Rapids' extravagant claim that a broad reading of Section 4(e) of the Act is necessary to prevent a "dewatering" of the Yellowstone. The Court should not be asked to base its construction of an Act of Congress on unproven and untrue assertions that "corporations" are about to "pirate" the Yellowstone and "dewater" that river.

2. Nor is a strained reading of the Act to provide the FPC licensing jurisdiction necessary to prevent "the uncontrolled exhaustion of the region's water resources," as Buffalo Rapids claims (Br. at 16). The Buffalo Rapids brief asserts that unless this Court gives licensing jurisdiction to the Commission "a private utility can, without any Federal guidance or control whatever, pirate massive amounts of water

[8] The Notice of Appropriation by the United States for the Buffalo Rapids reclamation project, Dawson County, Montana Docket No. 193324, dated June 17, 1938, was for 1,340 cfs from the Yellowstone system, or approximately 970,839 acre feet per year, more than ten times the average annual diversion of 84,561 acre feet for that project some thirty years later.

from public streams" (Br. at 15), and that "waterways" like the Yellowstone, "dewatered at the *laissez-faire* whim of the corporations, cry out for some scheme of comprehensive Federal regulation" (Br. at 14). But the claim that there will be no adequate regulation if the Commission does not regulate disregards the pervasive federal and state regulation and environmental review of every phase of the Colstrip project, the example Buffalo Rapids proffers for the Court's attention.

To be sure, there is no other federal licensing jurisdiction over the siting *per se* of steam power plants. However, because of the "checkerboard" arrangement of federal and privately owned lands in the Great Plains and in Montana in particular, federal regulation, with environmental review, is pervasive. Thus, the federal approvals which the owners of the Colstrip project either have sought or will seek include permits for the construction of transmission lines across federal lands, the granting of new mining leases of federally owned coal necessary to provide fuel for later stages of the project, and approval of mining plans. Each of these approvals by the Departments of Interior or Agriculture will require an environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act, 83 Stat. 853 (1970), 42 U.S.C. § 4332(2)(C), and that impact statement will take into consideration the essential features of the project and their impacts, if any, upon the relevant environment. Indeed, the Bureau of Land Management of the Department of the Interior and the Forest Service of the Department of Agriculture have already commenced the preparation of an environmental impact statement under NEPA respecting these

and other aspects of the Colstrip project; and the Deputy Under Secretary of Interior has directed that the impact "statement should cover the powerplant, its transmission line, the water pipeline, the coal mine, and any related ancillary facilities and rights-of-way."[9] And, should application ever be made to the Bureau of Reclamation by the developers of Colstrip or any other industrial project for actual purchase and delivery of water, Interior has made it clear[10] that an environmental impact statement will be required under NEPA in each instance.[11]

Additional legislation for regulation and environmental review by the State of Montana covers every aspect of the Colstrip project. The Montana Environmental Policy Act, R.C.M. 1947, §§ 69-6501 *ff.*, is virtually identical to NEPA on the federal level and applies to all state actions with respect to the construction of a power plant and all associated facilities, as well as all coal mining activties. Under the Montana Utility Siting Act of 1973, R.C.M. 1947, §§ 70-801 *ff.*, no power facility may be constructed or

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[9] Memorandum to the Director, Bureau of Land Management, from William W. Lyons, Deputy Under Secretary, U.S. Department of Interior (February 22, 1974).

[10] Letter from Martin H. Oleson, Jr., Acting Regional Director, Bureau of Reclamation, U.S. Department of Interior, to all holders of option contracts under the Industrial Water Marketing Program (May 20, 1971).

[11] Buffalo Rapids suggests the possibility of further federal regulation in the form of inclusion of a "part of the Yellowstone River . . . under the Wild and Scenic Rivers Act," 82 Stat. 906 (1968), 16 U.S.C. §§ 1271 *ff.* (Br. at 9). As Buffalo Rapids' brief itself reveals, however, the portion of the river under study reaches "from Gardiner to Pompey's Pillar in Montana" and is no closer than forty miles upstream from the amici's point of diversion.

operated in Montana without a certificate of environmental compatibility and public need by the Montana Board of Natural Resources and Conservation. Applications under this act are now pending for permission to construct the second phase of the generating plant, two 500 kv transmission lines, and a pipeline to carry water from the Yellowstone River to Colstrip.[12] A six-volume draft environmental impact statement respecting these applications has been prepared pursant to "MEPA",[13] and some nineteen public meetings have been scheduled.[14]

The Montana Board of Natural Resources and Conservation has already passed upon applications by the amici under the Siting Act to construct the facilities necessary to divert water from the Yellowstone for use in connection with the first phase of the generating plant, including the construction of a water pumping station, water pipeline, and power transmission line from the river to Colstrip (Order of March 1, 1974).[15]

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[12] The construction of the generating plant itself for the first phase of the Colstrip project was commenced prior to the enactment of the Siting Act and is therefore not covered by that Act. However, as the discussion in the text discloses, the associated facilities and environmental equipment necessary for the operation of even this first phase are covered by the Siting Act.

[13] Montana Department of Natural Resources and Conservation, *Draft Environmental Impact Statement on Colstrip Electric Generating Units 3 & 4, 500 Kilovolt Transmission Lines and Associated Facilities* (November 1974).

[14] Letter announcement of the Montana Dept. Nat. Res. & Cons. (October 10, 1974).

[15] Thus, Buffalo Rapids asserts incorrectly (Br. at 6) that the Montana legislature has passed a "3-year moratorium on water diversions from the Yellowstone River." The statute suspends the granting of new permits for appropriations for three years *or* until "a final determination of existing rights has been made"

The action taken by the state with regard to these facilities was preceded by an environmental impact statement as required by "MEPA".[16] A similar application by the amici for a transmission line from Colstrip to Broadview, Montana was considered and approved by the Board of Natural Resources and Conservation (Order and Certificate of November 15, 1974), and the Board had before it an environmental impact statement as to this portion of the project also.[17]

Moreover, the Montana Utility Siting Act, R.C.M. 1947, §§ 70-801 *ff.*, requires the State Department of Health and Environmental Sciences to certify that a proposed power facility will not violate established state and federal air and water anti-pollution standards. The first phase of the Colstrip generating plant has been so certified by that Department (Permit No. 513-111472, April 23, 1973) after the preparation of an environmental impact statement which assessed all the various water and air pollution control equipment with which the Colstrip project is to be equipped.[18]

All mining operations associated with the Colstrip project are governed by the Montana Strip Mined Coal Conservation Act, R.C.M. 1947, §§ 50-1401 *ff.*, which

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under the state's new Montana Water Use Act (R.C.M. 1947, §§ 89-8-103 *ff*). Moreover, the Act "does not apply to applications to appropriate water for use by a utility facility for which a certificate of environmental compatibility and public need is granted pursuant to the Montana Utility Siting Act of 1973" (R.C.M. 1947, § 89-8-109), as is the case with the proposed diversion for the Colstrip project.

[16] Issued by the Mont. Dept. Nat. Res. & Cons. in January 1974.

[17] Issued by the Mont. Dept. Nat. Res. & Cons. in June 1974, with an addendum in October 1974.

[18] Issued by the Mont. Dept. Health & Env. Sciences in March 1973.

requires approval of mining plans on an annual basis by the Montana Department of State Lands. Finally, the Colstrip mining operations are also governed by the Montana Strip Mining and Reclamation Act, R.C.M. 1947, §§ 50-1034 *ff*. That Act may well be the strictest mining reclamation law in the United States and requires a mining operator to submit reclamation plans for approval and to post a bond that all acreage disturbed by strip mining is to be successfully reclaimed.[19] And, all approvals of mining and reclamation permits under these statutes must also be accompanied by environmental impact statements under "MEPA".

Whatever may be the case in other river basins, then, the state and federal regulation respecting steam power plants in Montana which draw water from the Yellowstone River or its tributaries is pervasive. Accordingly, there simply is no substance to Buffalo Rapids' argument that this Court should read the Federal Power Act broadly on the ground that without FPC licensing jurisdiction there will be no adequate regulation.

CONCLUSION

There is nothing in the record of this case or in the arguments of counsel for Buffalo Rapids which would warrant stretching Section 4(e) of the Federal Power Act in the fashion urged by the Chemehuevi Tribe and by Buffalo Rapids. The dimensions of future develop-

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[19] Surface Mining Permit No. 00003, issued on December 17, 1973 by the Department of State Lands to the Western Energy Company, a subsidiary of one of the amici operating at Colstrip, requires a bond of $2,796,860 for reclamation of the acres currently being mined.

ment of steam electric generating plants in the Yellowstone River system cannot be predicted at this time, but the facts regarding the Colstrip project clearly do not support Buffalo Rapids' argument in favor of FPC jurisdiction. Instead, they demonstrate the absence of any need for such a strained reading of the statute. A project that will divert only one-third of one percent of the average annual flow of the Yellowstone River and which has been and will be scrutinized in virtually every detail by agencies of both federal and state governments, surely cannot accurately be said to demonstrate that the nation's rivers either are "being dewatered" "with a stroke of the pen" or "cry out for some scheme of comprehensive Federal regulation" by the Federal Power Commission. Moreover, since the amount of water needed for the project is so small compared with known agricultural, municipal, and other industrial uses, even the strained reading of Section 4(e) of the Act would not confer upon the Commission the authority necessary for a comprehensive regulation of the river. For these and other reasons advanced in the briefs of the Solicitor General and the Arizona Public Service Company et al., the decision of the court of appeals should be affirmed insofar as it held that the "project works" clause of Section 4(e) of the Act does not apply to steam generating plants and reversed insofar as it held that the "surplus water" clause does apply to steam plants. There is no warrant for any other reading of the statute.

Respectfully submitted.

FRANCIS M. SHEA
RICHARD T. CONWAY
DAVID BOOTH BEERS
SHEA AND GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

WILLIAM H. COLDIRON
MELVYN RYAN
40 East Broadway
Butte, Montana 59701

WARREN HASTINGS
621 S. W. Alder Street
Portland, Oregon 97205

DOUGLAS P. BIEGHLE
WILLIAM S. WEAVER
PERKINS, COLE, STONE, OLSEN
& WILLIAMS
1900 Washington Building
Seattle, Washington 98101

ALLAN P. O'KELLY
PAINE, LOWE, COFFIN,
HERMAN & O'KELLY
1400 Washington Trust Bank
Building
Spokane, Washington 99204

RICHARD D. BACH
RIVES, BONYHADI
& DRUMMOND
1400 Public Service Building
920 Southwest Sixth Avenue
Portland, Oregon 97204

Attorneys for the Amici Curiae

Of Counsel:

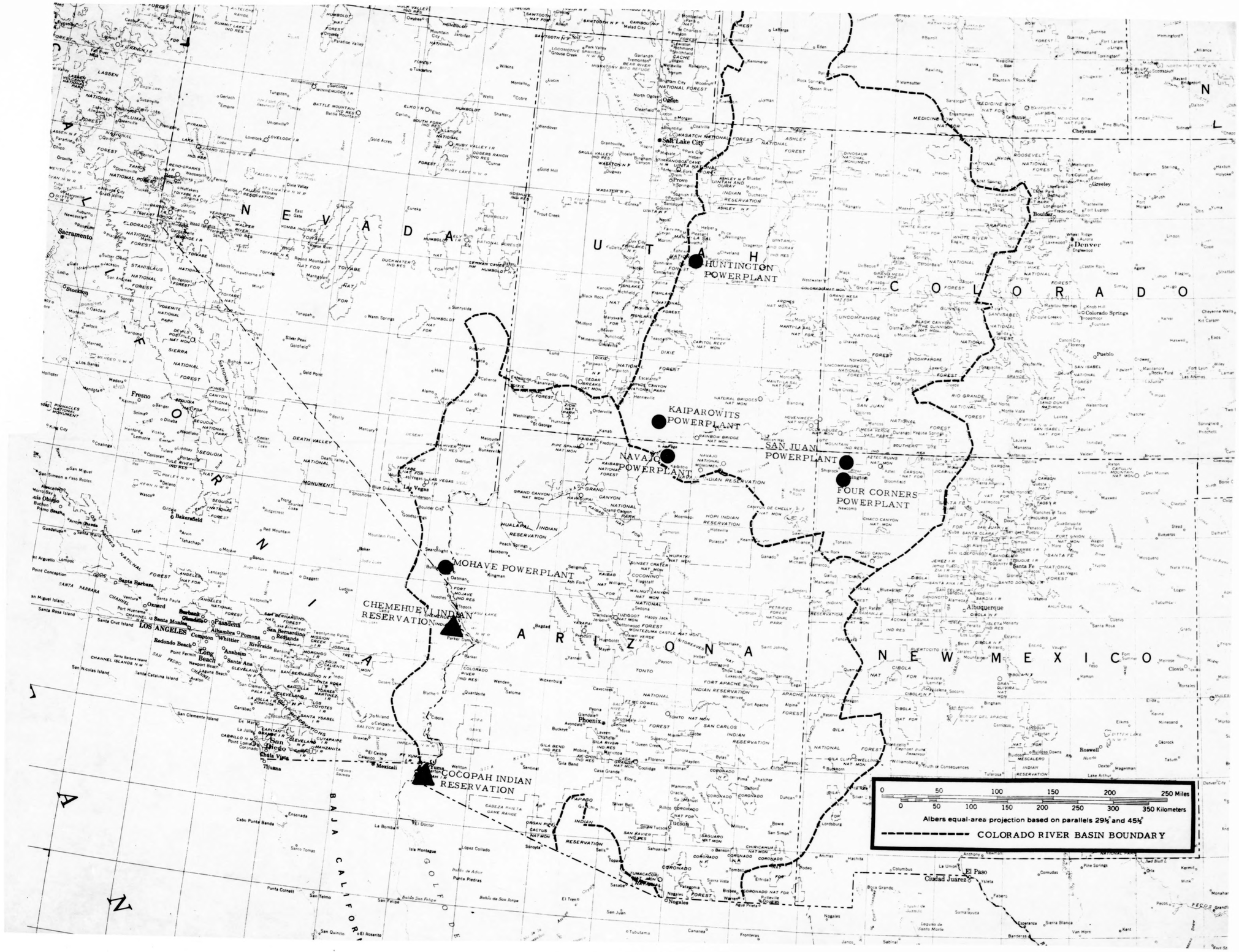
SHEA AND GARDNER
734 Fifteenth Street, N.W.
Washington, D. C. 20005

Dated: January, 1975

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Tijuana
0 50 100 150 200 250 Miles
0 50 100 150 200 250 300 350 Kilometers
Albers equal-area projection based on parallels 29½ and 45½
COLORADO RIVER BASIN BOUNDARY